The Central Law Journal.

*ST. LOUIS, AUGUST 22, 1890.*

The result of the execution by electricity of Kemmler, the New York murderer, was not such as to encourage friends of that mode of punishment to believe that it will be adopted in other States. At the same time, it may be said that, so far as the object to be attained was concerned, viz: the immediate and painless death of the culprit, the execution was successful. All the physicians present agreed that death was practically instantaneous, and without pain. There were some features, resulting from inexperience in the use of the instrument, which, to those not familiar with such manifestations, seemed revolting and cruel. It must be remembered, however, that this execution cannot be regarded as anything more than an experiment, and, as such, it was not a complete success. Still, we should recall what was sought to be gained by the use of electricity for such a purpose. The alternative is hanging. No form of death which draws blood or dissevers the body would be tolerated in America. It is only because we are so familiar with hanging that its utterly brutal conditions are tolerated. One only needs to reflect upon the tortures involved in a suspension by the neck with a tightened rope cutting into the flesh, to satisfy himself that no suffering could be profounder than that endured by a hanged man. To witness the long and desperate struggles of a poor wretch, who is undergoing the slow process of strangulation, is to witness a spectacle of unspeakable horror. It is probable that the spectacle of Kemmler's death was equally dreadful, but it is also probable that consciousness and any sense of pain fled at the first approach of the electric current. Unquestionably there were serious defects in the mechanical arrangements, and to some of these, which can be obviated hereafter, may be ascribed the horrors of this particular case. That there will now be a loud outcry against the new law is to be expected; and probably all sorts of expedients will be resorted to, to prevent another application. While it is not, by any means, settled that the law should endure, further tests of its efficacy should be made. These will be in the interest of mercy and civilization.



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Notwithstanding the requirement of the New York law, as to execution by electricity, that newspapers shall not publish or print the details of such executions, it is worthy of note that New York newspapers and, indeed newspapers in all parts of the country, have given their readers even more on the subject of the Kemmler execution than usually follows an ordinary every-day hanging, which is but natural, in view of the novelty and public interest attached to it. It is reported that the officer, whose duty it is to execute the law and punish the offending newspapers, has declared his intention not to proceed in that direction. Though we do not believe that a public official should shirk his duty, we think it wise, in this case, that he should at least go slow in the execution of a law, which is so clearly opposed to public interest and public sentiment, and whose validity and efficacy we very much question.

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The new uniform bill of lading, which has recently been adopted by the railroads, is exciting widespread consternation among shippers, from the fact that it will bear across its face the words "not negotiable," and because it appears to be a direct blow at one of the most advantageous commercial expedients known. Opposition to this feature is springing up everywhere among commercial men, and in all the large cities the boards of trade have adopted resolutions, claiming that a bill of lading properly made out and signed is a proper, reasonable and safe negotiable security, and that no public carrier has a right to stamp it "non-negotiable." The carriers seem to have copied from the English bills of lading act all that portion that suited them, and thus formed the obnoxious bill now to be used. The railroads have issued a circular, the aim of which is to explain the effect of the new bill intelligently, and on the subject of the "not-negotiable" feature reads as follows:

**The words "not negotiable" on the new bills of lading refer to their strict legal significance and the requirements of certain local State laws. It is not the wish of the carriers to restrict the uses of those bills of lading as collateral to secure advances. The carriers**

recognize the commercial needs for such uses of bills of lading, and desire to facilitate them in every way consistent with security to themselves and their patrons. Counsel learned in the law advise that the new form with the words "non-negotiable" across its face and with the provisions of condition No. 9 is transferable by indorsement, and is in every respect as available for safe collateral uses as the old form. All the shipper has to do is to consign to "order" when he wishes so to use a bill of lading.

Notwithstanding this, legal opinion seems to be agreed that the change in the bill of lading and the words "not negotiable," taken with relation to the rest of the agreement of the bill, will not affect its negotiability in the least. And though we are not advised as to the exact form of the instrument to be used, it is difficult to understand how an instrument, negotiable under the law, can be made any the less so by the simple addition of the term "not negotiable."

## NOTES OF RECENT DECISIONS.

ASSIGNMENT — CHOSE IN ACTION — CONSPIRACY.—In Murray v. Buell, 45 N. W. Rep. 667, the Supreme Court of Wisconsin hold that a cause of action arising out of a conspiracy to monopolize the entire coal business of a city, and to drive a coal dealer out of business, is not assignable either at common law or under Rev. Stat. Wis. § 4253, as amended by Laws 1887, ch. 280, providing that actions for assault and battery, for false imprisonment or other damage to the person shall survive. Cassoday, J., says:

However ungrateful it may have been in the plaintiff, nearly two years after he had assigned his alleged cause of action to Thomas F. Clarke, and after the latter had, on the faith of such assignment, incurred the liabilities and advanced the moneys in action, mentioned in the foregoing statement, to settle with the defendants, and to release and discharge them from any and all liability by reason thereof, as stated, without the knowledge or concurrence of Mr. Clarke, yet we are forced to hold that such cause of action was not assignable; and that Mr. Clarke obtained no right to the same, nor to control or continue the action in the name of the plaintiff, or otherwise, by virtue of such assignment. In Noonan v. Orton, 34 Wis. 259, it was held that an action in tort for a personal injury, resulting in a special loss to the plaintiff's business, did not pass to his general assignee in bankruptcy, for the reason that such cause of action was not assignable. To the same effect, Gibson v. Gibson, 43 Wis. 23; Kusterer v. City of Beaver Dam, 56 Wis. 471, 14 N. W. Rep. 617. In the last case mentioned it was held that "a party having a cause of action, in its nature not assignable, cannot, by an agreement before judgment or a verdict thereon, give his attorney any interest therein or in the costs which would be incident to a recovery, which will survive a settlement of the cause of action." That case has since been frequently sanctioned by this and other courts. Voell v. Kelley, 64 Wis. 505, 25 N. W. Rep. 536; Manufacturing Co. v. Miller, 69 Wis. 391, 34 N. W. Rep. 235; Lamont v. Railroad Co. 2 Mackey, 502; Miller v. Newell, 47 Amer. Rep. 833. In the case in 69 Wis., above cited, it was held that where a judgment is recovered in such action of tort, and the defendant therein is garnished by a creditor of the plaintiff, and such judgment is subsequently reversed, and such creditor perfects his judgment against the plaintiff in the tort action before the latter recovers another and final judgment against the wrong-doer, the latter judgment is not subject to nor affected by such garnishment; and this was so held on the theory that, although such garnishment was in the nature of a compulsory assignment of the judgment so reversed, yet that it did not transfer the cause of action, nor the judgment subsequently obtained therein. These cases go on the theory that such actions and causes of action for personal injury or injury to business did not survive the death of the plaintiff at common law, nor by section 4253, Rev. St. Randall v. Telegraph Co., 54 Wis. 141, 11 N. W. Rep. 419; Farrall v. Shea, 66 Wis. 565, 29 N. W. Rep. 634; Cotter v. Plumer, 72 Wis. 478, 40 N. W. Rep. 379. It is claimed, however, that such cause of action would survive by virtue of chapter 280, Laws 1887, amending that section by the introduction of the words, "or other damage to the person," so that the part here applicable now reads: "Actions for assault and battery, or false imprisonment, or other damage to the person." But it is very manifest that the conspiracy in question inflicted no injury or damage to the person of the plaintiff. The acts alleged were unlawful, and injured his business, and gave him a right of action for damages but such damages were in no sense "damage to the person" of the plaintiff. Hiner v. City of Fon du Lac, 71 Wis. 81, 82, 36 N. W. Rep. 632. For a discussion of such injury to the person, see the opinion of Mr. Justice Orton in Duffies v. Duffies, *ante*, 522, and the cases therein cited. Since the cause of action here alleged would not have survived, it is very evident it was not assignable, and that Mr. Clarke got nothing by virtue of his assignment.

CRIMINAL EVIDENCE — HOMICIDE — DYING DECLARATIONS. — The question whether a dying declaration, reduced to writing and signed by the dying man, is admissible in evidence, came before the Supreme Court of Ohio, in State v. Kindle, 24 N. E. Rep. 485. There, it was held that upon a trial for murder, after proper preliminary proof has been given, it is not error to admit in evidence and permit to be read to the jury a written statement of the injured person, made *in extremis*, while conscious of his condition and under a sense of impending dissolution, where such declaration was, at the time, reduced to writing by a competent person, at the instance of the declarant or with his consent, was approved and signed by him, and con-

taining statements of the circumstances of the unlawful act which is the subject of the charge. Spear, J., says:

The question presented by the bill of exceptions is, did the court err in the admission as evidence of the written statement purporting to be a dying declaration? While some of the statements of the bill respecting the preliminary proof are not couched in the clearest and most positive language, yet it is fairly to be understood that the testimony of the witnesses satisfied the judge that the statement was prepared by one of the witnesses called, under the direction of the deceased; that it was by one of the witnesses read over to him, and was actualy signed by him; and that at the time he was under a sense of impending death, and had no hope of recovery. The paper itself shows that it is a recital of the circumstances immediately attending the assault which resulted in Butt's death. It is not questioned that the words used by the defendant, or the substance of them, might have been testified to orally by those who heard them, if they were able to recall them; but it is insisted by counsel for defendant that to admit the written statement of the deceased is to make him a witness in the case, and is a violation of that clause of the constitution of the United States which provides that every person on trial, charged with crime, shall have the right "to be confronted with the witnesses against him," and of the like clause in our own constitution which provides that in any such trial the party accused shall be allowed "to meet the witnesses face to face." It being conceded that what the deceased said is the substantive matter to be given to the jury, the only question is as to the proper mode of communicating from the declarant to the jury.

Dying declarations have been received in evidence on the ground of necessity, there often being no other evidence of the facts attainable, and sometimes on the further ground that the solemn circumstances surrounding the wounded person, in view of impending death, will create an obligation to utter the truth equal, in its influence, to the obligation of an oath, though it is difficult to see why, if the latter is a substantive ground, the declarations should be limited to the facts immediately connected with the killing. Mr. Roscoe, in his work on Criminal Evidence, observes that the concurrence of both these reasons led to the admission of this species of evidence. Page 33. Such declarations are in the nature of hearsay, and their admission is an exception to the general rule of evidence. It follows from this that the person making them is not, but the person by whom they are proven is, the witness. Hence the witness by whom the accused has the right to be confronted, is the one cause to lay the foundation for proof of the declaration, and by whom the making of the declaration is established. The object is to give the accused the opportunity to see and hear the witness, and for cross-examination. If these objects are secured, the guaranty of the constitution is maintained. Applying these conclusions to the case at bar, how can it be said that the accused was deprived of any right? In order to intelligently prepare the paper signed by the declarant, it was necessary for the witness to first talk with him, or at least hear his verbal statement. Then, having reduced the statement to writing, he read it to the declarant, and it was then signed by him. All this must have been shown by the witness before the court could have been satisfied of the necessary facts preliminary to the admission of the paper. Being thus testified to, the whole transaction, and every detail, was the subject of cross-examination. The accused could inquire as to just what the declarant actually said, just how much care was taken in writing out the statement, how carefully and distinctly the paper was read to the declarant, and, in short as to all that was said and done, the order of it, and the manner of it. Whether the accused availed himself of this opportunity or not, the opportunity was present. It is clear that in this case the constitutional requirement was complied with, and every constitutional right was preserved to the accused. Where this appears, the only question is, which is the preferable evidence of the actual declarations—the memory of witnesses, and their ability to reproduce the words used, or the substance of them, or the paper, reduced to writing at the time, and signed by the party making the statement? Or, to present the exact question in this case, is there such preference to be given the former method as to render the latter improper? We think not. The common judgment of mankind, formed upon observation and experience, is that the attempt to repeat the language of others is always attended with uncertainty. It is in recognition of this fact that the custom has obtained at trials for the judge to caution the jury in weighing and considering testimony of this kind. The witness may not have fully understood the declarant. He may not recollect acurately the words or their substance; or, having understood and remembering, he may not be able to fully and clearly express himself in their reproduction. At least the written statement, approved and signed by the declarant, is not, ordinarily, open to these objections. Nor can it be said that the paper so prepared and verified has not a legitimate tendency to prove the facts sought to be proven; that is, to show what the dying man said.

But, if we had doubts as to this conclusion, on principle, we would be impelled to the same result upon authority. The admissibility of dying declarations in cases of homicide has been recognized by the courts for more than a century, and the question of the form in which such delarations shall be given to the jury has often been under consideration. In King v. Ely, tried before Chief Justice King at Old Bailey, in 1720 (12 Vin. Abr. 118), it was held that, "in the case of murder, what the deceased declared, after the wound given, may be given in evidence;" and in Trowter's Case, *Id.* 119, "the court would not admit the declaration of the deceased, which had been reduced into writing, to be given in evidence without producing the writing." To like effect is Rex v. Woodcock, 1 Leach, 500 (decided in 1789). In Rex v. Gay, 7 Car. & P. 230, it was declared that if a declaration *in articulo mortis* be taken down in writing, and signed by the party making it, the judge will neither receive a copy of the paper in evidence, nor will he receive parol evidence of the declaration;" and Coleridge, J., refused to receive the parol evidence offered. Under the head of "Form of Declaration," Mr. Phillips, in his work on Evidence (volume 1, p. 240), uses the following language: "With regard to the manner in which a dying declaration may become the subject of legal evidence, it may be observed that an examination taken on oath by a magistrate, and signed by the deceased and by the magistrate, has been received in evidence as of the same effect in point of admissibility as declarations not made with the same solemnity." And in a note to page 241 occurs this: "Where the statement of the deceased is taken down in writing, it is of course

more reliable, more accurate, than the memory of most men; but it is no higher grade than unwritten testimony." Prof. Greenleaf in his work on Evidence (section 161) gives the rule, that, "if the statement of the deceased was committed to writing, and signed by him, at the time it was made, it has been held essential that the writing should be produced, if existing." Mr. Wharton, in his work on Criminal Evidence (section 295), thus states the rule: "If the declaration of the deceased, at the time of his making it, be reduced into writing, and then read and approved by him as giving his deliberate view, the written document becomes primary evidence." It was held by the Supreme Court of Iowa, in State v. Tweedy, 11 Iowa, 350, that "when declarations *in extremis* are reduced to writing and signed by the person making them, the writing, if in existence, must be produced as evidence of such declarations." The admissibility of competent declarations, so evidenced, has been directly sustained in California (People v. Glenn, 10 Cal. 32); in Texas (Krebs v. State, 8 Tex. App. 1); in Arkansas (Collier v. State, 20 Ark. 36); in Mississippi (Merrill v. State, 58 Miss. 65); in Alabama (Kelly v. State, 52 Ala. 361); in South Carolina (State v. Ferguson, 2 Hill, 619); in Kentucky (Mockabee v. Com., 78 Ky. 380); in Indiana (Binns v. State, 46 Ind. 311); and in Wisconsin (State v. Martin, 30 Wis. 216). And, inferentially, in Tennessee (Epperson v. State, 5 Lea, 291); and in Massachusetts (Com. v. Haney, 127 Mass. 455). That such written statements are not admissible as depositions has been several times held, as in the last-named case, but, if there are any holdings against their admissibility under the general head of dying declarations, our attention has not been called to them, nor have we found such in an extended search of authorities. At all events, there is, beyond doubt, a marked agreement in favor of their admissibility.

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ATTACHMENT — FRAUDULENT TRANSFER — BURDEN OF PROOF.—The Supreme Court of Mississippi, in Richards v. Vaccaro, 7 South. Rep. 506, decide an interesting question as to the effect of a fraudulent transfer of goods to an innocent purchaser for value. It was there held that where goods attached upon the ground of fraud were claimed by a purchaser from defendant, and, on trial of the issue of defendant's indebtedness, the transfer was shown to be fraudulent on his part, the burden was on the claimant, on the question of sustaining the attachment, to show that he was an innocent purchaser for value. Cooper, J., says:

There is conflict in the decisions, and much confusion among the text-writers, on the question involved. The effect of the statute against fraudulent conveyances, as held by one line of decisions, is about this: Conveyances made by a grantor in fraud of his creditors are valid unless it be shown that the purchaser is not a purchaser for value, and in good faith. Another line of authorities states the effect of the statute to be that conveyances fraudulent on the part of the grantor are invalid at the suit of his creditors, unless it be shown that the purchaser is a purchaser for value, and in good faith. The authorities are uniform in declaring that one who attacks a conveyance as fraudulently made must establish the fraud. The burden of proof is upon him, and he is opposed by the presumption of good faith and legality that attaches in favor of the ordinary transaction of business. The conflict of decision arises a step beyond, when the inquiry is whether the plaintiff, by proof of the fraud of the grantor, has made a *prima facie* case against the grantee, entitling him to recover, in the absence of any evidence by his adversary. In Massachusetts, New Jersey, Iowa, Wisconsin, Connecticut, and Maryland, it is held that the plaintiff must not only show fraud on the part of the seller, but participation in or notice of it by the buyer. Bridge v. Eggleson, 14 Mass. 245; Foster v. Hull, 12 Pick. 89; Insurance Co. v. Tooker, 35 N. J. Eq. 408; Tantum v. Green, 21 N. J. Eq. 364; Bank v. Northrup, 22 N. J. Eq. 58; Adams v. Foley, 4 Iowa, 44; Fifield v. Gaston, 21 Iowa, 218; Mehlhop v. Pettibone, 54 Wis. 652, 11 N. W. Rep. 553; Partelo v. Harris, 26 Conn. 480; Cooke v. Cooke, 43 Md. 524. On the other hand, the courts of Pennsylvania, New York, Alabama, Texas, Arkansas, and North Carolina hold that, where the fraud of the grantor is established, a *prima facie* case is made by the plaintiff, which must be met by the purchaser by evidence that he is a purchaser in good faith, for value. Rogers v. Hall, 4 Watts, 359; Clark v. Depew, 25 Pa. St. 509; Lloyd v. Lynch, 28 Pa. St. 419; Starin v. Kelly, 88 N. Y. 418; Hamilton v. Blackwell, 60 Ala. 545; Gordon v. Tweedy, 71 Ala. 202; Brown v. Hedge Co., 64 Tex. 396; Miller v. Fraley, 21 Ark. 22; Fullenwider v. Roberts, 4 Dev. & B. 278; Worthy v. Caddell, 76 N. C. 82. We concur in the views announced by those courts which hold that proof of fraud on the part of the grantor is sufficient to entitle his creditors to subject the property fraudulently assigned, in the absence of evidence showing the claimant to be a purchaser for value, and in good faith. We fail to perceive why, in cases of this character, the party assailing the conveyance shall be required to assume the burden of showing participation in the fraud by the purchaser, and the non-payment of value for the property fraudulently conveyed.

The decisions holding it to be the duty of the creditor to establish not only the fraud of the seller, but that of the purchaser, seems to rest upon an undue extension of the rule that fraud is never to be presumed, but must always be proved by the party alleging it to exist. The rule is so well established as to have become one of the maxims of the law; but it is not true that, where a transaction has been shown to be fraudulent on the part of one of the actors, it is incumbent upon a party claiming or defending against it to show the fraud of the other actor claiming under it. Good faith and legality are presumed to exist in reference to the ordinary business transactions of life, and the burden is upon him who asserts the contrary; but it is otherwise when the transaction is itself unfair, or is shown to be *prima facie* illegal. Whar. Ev. §§ 366, 1248; Bigelow, Frauds, 130, 132. Mr. Bigelow, while denying that the defense of purchase for value is new matter in avoidance, concedes that the plaintiff proving the fraud of the seller makes a *prima facie* case. He says: "A scrutiny, however, of the situation, in such a case, will show that the defense of purchase for value is not new matter in avoidance. The defendant, being a purchaser from one having the legal title, * * * has himself acquired that title. The plaintiff can then only have an equitable title, and, to prevail, he must overcome the former; and this whether he

sues at law or in equity. In other words, he must show that the purchaser's title is bad. This he undertakes to do by showing that the vendor's title was obtained from him [the plaintiff] by the vendor's fraud; and this is sufficient. But how does it become so? The answer is that in law it shows presumptive notice to the defendant. The defendant is presumed, *prima facie*, to be privy to his grantor's fraud. This presumption the defendant must now meet, but just as he would meet any other fact alleged and testified to, or presumptively shown, by the plaintiff. The defense is still negative, *i. e.*, denial. Hence, the burden of proof is still upon the plaintiff." "But it may still be thought necessary to inquire whether the plaintiff himself has really sustained the burden of proof, so as to require the defendant to come to the support of his defense, by merely showing fraud. It may be asked if the plaintiff ought not to go further, and, though he has made a clear case of fraud in the grantor offer some definite evidence of notice, of what, for the present purpose, is the same thing—that the conveyance to the defendant was voluntary. The answer of the authorities, though not without here and there a discordant note, is that evidence of the fraud is enough, and this whether the case be one of fraud on creditors or fraud on a vendor. Such is the better answer in those States in which, in cases of fraud upon creditors, notice to the purchaser is sufficient to defeat his title."

There are two classes of suits at law so nearly analogous to suits by creditors to subject property fraudulently conveyed that is difficult to draw a distinction between them sufficient to warrant the application of different rules of procedure. These are suits by one whose property has been secured by the fraud of the vendee, and who sues to recover them from another claiming under the fraudulent vendee, and suits by an indorsee of a bill or note against the maker, who defends upon the ground that the instrument was secured by the fraud of the payee. In these cases it has been uniformly held that proof of the fraud of the first vendee of the property, or payee of the note, imposes upon the party claiming under him the duty of showing that he is a purchaser for value and it good faith. Bailey v. Bidwell, 13 Mees. & W. 73; Fitch v. Jones, 32 Eng. Law & Eq. 134; Paton v. Coit, 5 Mich. 505; Clark v. Pease, 41 N. H. 414; Bigelow, Fraud, 132; Spira v. Hornthall, 77 Ala. 137; Easter v. Allen, 8 Allen, 7; Morgan v. Morse, 13 Gray, 150; Haskins v. Warren, 115 Mass. 514. Proof that the purchaser bought for value, the price paid being adequate, is generally held, in the absence of other evidence showing notice of the fraud to raise the presumption of good faith. Starin v. Kelly, 88 N. Y. 418; Shores v. Doherty, 65 Wis. 153, 26 N. W. Rep. 577; Spira v. Hornthall, 77 Ala. 137.

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HOLIDAYS—CHRISTMAS DAY—SERVICE OF PROCESS.—The Supreme Court of New York, in Didsbury v. Van Tassel, 10 N. Y. Supp. 32, hold that Laws N. Y. 1881, ch. 30, providing that certain days and half days, including Christmas day, shall be considered Sunday, for the purpose of presenting and protesting commercial paper, and for the purpose of transacting business in a public office within the State, does not diminish the number of judicial days, and service of a summons on Christmas day is valid.

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## THE PROGRESS OF EQUITY IN FOLLOWING TRUST FUNDS.

### II.

While there is necessarily much difficulty in deducing general rules for guidance in dealing with the great varity of cases that may arise for the application of the doctrine of equity under consideration, still, the following may be submitted as constituting a part, at least, of the points that have been decided by the most recent English and American cases concerned with the matter of following money or funds impressed with a trust:

1. There is no distinction between a rightful and a wrongful disposition of the property by the trustee or a party standing in the fiduciary position, so far as regards the right of the beneficial owner to follow the proceeds.[1]

[1] Knatchbull v. Hallett, 13 Ch. D. 708 bot., 709, 710. Only two cases in all the books deny this proposition and they may be regarded exceptional: Fletcher v. Sharpe, 108 Ind. 276; 26 Am. L. Reg. 71 and note (1886). McAfee v. Bland (Ct. App. Ky.), 11 S. W. Rep. 439 (1889). In the Indiana case certain administrators had, in their own name, made from time to time deposits with Fletcher & Sharpe, bankers. The latter were, however, particularly notified by the administrators that the funds so deposited belonged to the estate of which they were administrators. The bankers failed and a receiver was appointed; $22,000 of the funds of the estate were on deposit at the time of the failure to the credit of the administrators. The total amount of the assets was $500,000. The liabilities were $1,500,000. The court held that the funds deposited by the administrators could not be followed and recovered from the receiver in priority to the claims of general creditors, even though the same were trust funds; that the administrators had rightfully made the deposits and that, therefore, the relation of debtor and creditor arose between them and the bankers as to the trust deposits. The court distinguished the case before them from Knatchbull v. Hallett, National Bank v. Insurance Co., 104 U. S. 54, and other leading English and American cases, upon the ground that they had been decided upon a State of facts showing a wrongful disposition—a misappropriation—of trust funds by parties standing in a fiduciary position. But no such distinction was made in any of the cases cited. On the contrary, in Knatchbull v. Hallett, as noted above, 13 Ch. D. 708, 709, 710, the master of the rolls positively announced that there was no such distinction, and the case *Ex parte* Dale & Co., 11 Ch. D. 772, was overruled by him for having made the same. See 13 Ch. D. 702, 703. The Kentucky case, McAfee v. Bland, makes the same distinction, but was decided under the general statutes of Ky. ch. 44, art. 2, § 7, which allow a priority to "debts due as trustee, if the trust be credited by deed or will duly recorded in the proper clerk's office." But the court asserts, nevertheless, that its ruling would have been the same at common law and decided that an assignee under the State insolvent law who had deposited

2. The *cestui que trust* or beneficiary may invoke the aid of the courts in his behalf, whether the proceeding in which he seeks to enforce his rights be at law or in equity.[2]

3. The relief will be given whether the *cestui que trust* be technically such by reason of an express trust, or whether he be merely a party in whose favor the law will imply or raise a trust because of the existence of any fiduciary relation whatsoever,[3] such as that of principal and agent[4] and its several branches; bailor and bailee,[5] merchant or principal and factor,[6] client and solicitor,[7] consignor and consignee,[8] client and broker,[9] employer or principal and collecting agent,[10] and other relations of like nature.

4. The relief will be given not only when the subject-matter of the trust is to be found *in specie*, but also when the proceeds of the same are to be traced, identified or ascertained after a change in the nature or character of the money or funds as originally appertaining to the trust, and such proceeds will be subjected to the trust, through whatever transmutations they may have gone or may have been put, whether by the trustee

moneys belonging to the assigned estate in his hands in the banking house of a firm with the knowledge of the latter that the moneys were trust funds was not, upon the insolvency and assignment of the banking firm, entitled to priority over the claims of the other creditors of that firm. Ryan v. Morrill, 83 Ky. 352, was distinguished as showing a misappropriation of trust funds.

[2] Knatchbull v. Hallett, 13 Ch. D. 722. National Bank v. Insurance Co., 104 U. S. 54 (1881), a suit in equity. Allen v. St. Louis Bank, 120 U. S. 20 (1886), an action at law. Hoffman v. Nat. Bank, 46 N. J. Law, 604.

[3] Knatchbull v. Hallett, 13 Ch. D. 709, 710; People v. City Bank of Rochester, 96 N. Y. 32 (1884). (Followed by People v. Bank, 39 Hun, 187 and McCall v. Fraser, 40 Hun, 111); McLeod v. Evans, 66 Wis. 401 (1886). (Followed by Francis v. Evans, 33 N. W. Rep. 93 (1887). Harrison v. Smith, 83 Mo. 210 (1884), Approved in Stoller v. Coates, 88 Mo. 514 (1885); Peak v. Ellicott, 30 Kan. 156 (1883); Bank v. Weems, 69 Tex. 489 (1888). These American cases are criticised in Philadelphia Nat. Bank v. Dowd, 38 Fed Rep. 172 (1889), upon the points as to tracing the trust funds into the hands of an assignee or receiver. See also Commercial Nat. Bank v. Armstrong, 39 Fed. Rep. 684 (1889).

[4] Peak v. Ellicott, 30 Kan. 156 (1883); Van Alen v. American Nat. Bank, 52 N. Y. 1 (1873); Bank v. Bache, 71 Pa. St. 213 (1872). Neely v. Rood, 54 Mich. 34 (1884). National Bank v. Insurance Co., 104 U. S. 54 (1881); Levi v. Bank, 5 Dill, 241 (1879).

[5] Brochus v. Morgan, 5 Cent. L. J. 53 (1875).

[6] Commercial Nat. Bank v. Hilbronner, 108 N. Y. 439 (1888); Baker v. Nat. Exchange Bank, 100 N. Y. 31 (1885); Vail v. Admrs. of Mitchell, 4 Wash. C. C. 105 (1821); Fahnestock v. Bailey, 3 Metc. (Ky.), 48 (1850). Allen v. St. Louis Bank, 120 U. S. 20 (1886).

[7] Knatchbull v. Hallett, 13 Ch. D. 699 (1879); *Ex parte* Hardcastle, 44 Law T. (N. S.) 523 (1881). Carson v. Sloane, 13 L. R. (Ir.) Ch. D. 139, 147 (1884); Hopper v. Convers, L. R. 2 Eq. 549; Middleton v. Pollock, 4 Ch. D. 49.

[8] Denston v. Perkins, 2 Pick. 86 (1824); Chesterfield Mfg. Co. v. Dehou, 5 Pick. 7 (1827); Merrill v. Bank of Norfolk, 19 Pick. 32 (1837).

[9] *Ex parte* Cook, 4 Ch. D. 123 (1876).

[10] Birt v. Burt, reported in a note to *Ex parte* Dale & Co., 11 Ch. D. 773 (1877); Bank v. King, 57 Pa. St. (1868). Here may be placed cases involving the employment of banks or bankers to collect commercial paper. Where it appears that the paper was sent out indorsed "for collection," or even "for collection and credit" with an agreement on the part of the collecting bank to remit the proceeds on specified dates and there is no intention on the part of the employer to transfer the title to the paper to the collecting bank or to open a deposit account with it or to deposit the paper as cash, or where the collecting bank fails upon receiving or upon the eve of receiving the paper, and thereafter collects the same through its officers, assignees or receiver, or so attempts to collect, or to credit a collection of the same made just prior to the failure by a subagent, or where it fraudulently receives the paper for collection on the eve of the failure, or where the same was received and collected after the dissolution of a banking firm by the death of a partner, the owner of the paper may follow and recover the proceeds of the same if he can identify and trace them into the hands of an assignee or receiver of the defendant bank or banking firm, or of a subagent of the latter. Commercial Nat. Bank v. Armstrong, 39 Fed. Rep. 684 (1889); Fifth Nat. Bank v. Armstrong, 40 *Id.* 46 (1886); First Nat. Bank of Montgomery v. Armstrong, 36 *Id.* 59 (1888); Winter's Bank v. Armstrong, 33 *Id.* 405 (1887); First Nat. Bank of Circleville v. Bank of Monroe, 33 *Id.* 408 (1887); Schuler v. Laclede Bank, 27 *Id.* 424 (1886); Balbach v. Frelinghuysen, 15 *Id.* 675 (1883); German Sav. Insti. v. Adel, 1 McCrary, 501 (1880); City of St. Louis v. Johnston, 5 Dill. 241 (1878); Craige v. Hadley, 99 N. Y. 131 (1885); Importers' & Traders' Nat. Bank v. Peters, 1 N. Y. Supp. 89 (1889); Manufacturers' Nat. Bank v. Continental Bank (Mass.), 20 N. E. Rep. 193 (1889); First Nat. Bank of Alexandria v. Payne & Co.'s Assignees (Va.), 9 S. E. Rep. 153 (1889); White v Bank, 102 U. S. 658-661. In City Bank v. Weiss (Tex.), 3 S. W. Rep. 299 (1887), the proceeds of a collection were followed and recovered from a bank which had acted as subagent of the bank, originally employed after the failure of the latter and an attempt made by the subagent to convert the proceeds to the payment of a debt due to it from the bank originally employed by the owner of the paper, which was also a bank. In Thompson v. Gloucester Sav. Insti. (Ct. Chy. N. J.), 8 Atl. Rep. 97 (1887), and Bank v. Weems 69 Tex. (1888), the principle announced in Knatchbull v. Hallett was extended to cases which showed a collection and mingling of the proceeds of commercial paper with the funds of the collecting bank considerably prior in time to the failure of the latter and the appointment of a receiver and it was in effect determined that the entire funds of the defunct bank came to the hands of the receiver subject to a charge for the proceeds. This ruling is similiar to that in People v. City Bank of Rochester, 96 N. Y. 32; McLeod v. Evans, 66 Wis. 401; Harrison v. Smith, 83 Mo. 210; Peak v. Ellicott,

or third parties taking the same with notice of the trust.[11]

5. And in following such transferred property the *cestui que trust* or beneficial owner may trace the same into the hands of any transferee, unless he stands in the position of a *bona fide* purchaser for a valuable consideration without notice of the trust.[12]

6. The *cestui que trust* or beneficial owner may follow the trust property into the hands of a volunteer, whether he had notice of the trust or not, and into the hands of a purchaser for value, if he had notice of the trust.[13]

7. If the trust funds are money or are found to have been turned into money and mixed or blended and confounded, in a general mass of the same description, with money belonging to the trustee or with that of third persons who have acquired the trust funds from the trustee with notice, so as to present the case of an undivided and undistinguishable mass of current money, or of the proceeds, product, property, whether personal or real, in which such mixed fund has been invested, the *cestui que trust* or beneficial owner will have the right of a charge or equitable lien for the amount of the trust fund upon the mixed fund or such proceeds, product or property, and the whole will be treated as trust property, except so far as the trustee may be able to distinguish what is his own.[14]

30 Kan. 156, and the first branch of Bank v. Weems, 69 Tex. 459. The authority of those cases on this point is, however, denied in Philadelphia Nat. Bank v. Dowd, 38 Fed. Rep. 172 (1889) which holds that the proceeds of the collection must be distinctly traced into some "specific investment or fraud" which come to the hands of the receiver. To the same effect are Commercial Nat. Bank v. Armstrong, 39 Fed. Rep. 684 (1889), and Illinois, etc. Bank v. First Nat. Bank, 15 *Id.* 858; 21 Blatch. 275 (1883). Where by agreement or a course of dealing between a customer and a bank or between one bank and another, commercial paper sent for collection is to be credited as cash when received, the correspondent bank cannot recover the proceeds in priority over other creditors from the receiver of the collecting bank after the failure of the latter, even though such proceeds were not collected until after the failure. First Nat. Bank of Elkhart v. Armstrong, 39 Fed. Rep. 231 (1889); St. Louis, etc. R. R. Co. v. Johnston, 27 *Id.* 243 (1886); Metropolitan Nat. Bank v. Loyd, 90 N. Y. 531 (1882); People v. M. & M. Bank, 78 N. Y. 269. So where two banks kept a running account with one another and each week a balance was struck and paid, the avails of collection not being kept separate or in any way distinguished from other funds. The court decided that the relation between the banks was simply that of debtor and creditor, and that upon the failure of one bank, the other acquired no lien on any specific fund, nor any preference over creditors generally. People v. City Bank, 93 N. Y. 582 (1883).

[11] Knatchbull v. Hallett, 13 Ch. D. 696 (1879); Frith v. Cartland, 2 H. & M. 417 (1865); *Ex parte* Cooke, *In re* Strachan, 4 Ch. D. 123 (1876); Oliver v. Piatt, 3 How. 333, 401, 402 (1845); Wormley v. Wheaton, 8 Wheat, 422, 463 (1823); May v. LeClaire, 11 Wall. 217 (1870); Duncan v. Jandon, 15 Wall. 165 (1872); Bayne v. United States, 93 U. S. 642 (1876); United States v. State Nat. Bank of Boston, 96 U. S. 30 (1877); Wilson & Co. v. Smith, 3 How. 763; Bank of the Metropolis v. New England Bank, 6 *Id.* 212; Atlantic Bank v. Merchants' Bank, 10 Gray (Mass.), 532; Skinner v. Merchants' Bank, 4 Allen (Mass.), 290; National Bank v. Insurance Co., 104 U. S. 54, 68 (1881); Bank v. King, 57 Pa. St. 202 (1868); Van Alen v. American Nat. Bank, 52 N. Y. 1 (1873); Allen v. St. Louis Bank, 120 U. S. 20 (1886); Dow v. Berry, 18 Fed. Rep. 121 (1883); McCay v. Lamar, 20 Blatch. 474 (1882); Bank v. Bache, 71 Pa. St. 213 (1872); Third Nat. Bank v. Stillwater Gas. Co., 36 Minn. 75, 26 Am. L. Reg. 253 and note (1886); Humphreys v. Butler (Ark.), 11 S. W. Rep. 479 (1889), and cases cited. But the trust money must be distinctly traced and clearly proved to have been placed or invested in the property sought to be followed and subjected to the trust. Ferris v. Van Vechten, 73 N. Y. 113 (1878); *In re* Vetterlien, 26 Fed. Rep. 145 (1886); Zundell v. Gess (Tex.), 10 S. W. Rep. 693 (1989), reversing on rehearing, 9 *Id.* 879 and distinguishing Bank v. Weems, 69 Tex. 489; Parker v. Jones, 67 Ala. 234 (1880). It is proper to refer here to the case of trust moneys employed in trade as where an executor of a deceased partner continues his capital in the trade with the concurrence of the surviving partners, and carries on the trade with them and it afterwards becomes necessary to follow the trust capital. Pennell v. Deffell, 4 De G. M. & G. 388. This subject is in an unsettled State, each case depending upon its peculiar circumstances. See 1 Lindley Partn. (2d Am. from 5th Eng. ed. by Ewell), 160-162; 2 *Id.* 521-536 where the English and American cases are collected. Englar v. Offutt (Md.), 28 Cent. L. J. 339 (1889) and note. Ryan v. Morrill, 83 Ky. 352.

[12] Pennell v. Deffell, 4 De. G. M. & G. 372, 388; Oliver v. Piatt, 3 How. 333; National Bank v. Insurance Co., 104 U. S. 54; Allen v. St. Louis Bank, 126 U. S. 20; Commercial Nat. Bank v. Armstrong, 39 Fed. Rep. 691, 692; Holden v. New York and Erie Bank, 72 N. Y. 286 (1878). In Swift v. Williams, 68 Md. 236 (1887), a trustee had paid with trust money a debt which he owed in another capacity. The court held that the creditor, who received such payment, was liable to the trust estate for the amount thereof, whether or not he had notice that the trustee was misappropriating the trust funds. And the bank which, in this case, had acted negligently in allowing the trustee to make the fraudulent payment by honoring a check upon the trust funds held by it, was also held liable to the trust estate. Third National Bank v. Stillwater Gas. Co., 36 Minn. 75; Allen v. Russell, 78 Ky. 105; Brocchus v. Morgan (Tenn.), 5 Cent. L. J. 53; Zundell v. Gess (Tex.), 10 S. W. Rep. 693 (1889).

[13] 1 Perry on Trusts (3d ed.) §§ 217 *et seq*; 2 *Id.* Secs. 828 *et seq.* 838; Isom v. First Nat. Bank, 52 Miss. 902.

[14] Knatchbull v. Hallett, 13 Ch. D. 696; Oliver v. Piatt, 3 How. 333, 401, 402; National Bank v. Insurance Co., 104 U. S. 54, 68. As previously noted, the cases: People v. City Bank of Rochester, 96 N. Y. 32; McLeod v. Evans, 66 Wis. 401; Harrison v. Smith, 83

8. And where the trustee, or his transferee with notice, becomes insolvent or a bankrupt or dies, his legal representatives, whether trustees in liquidation, assignees, receivers, administrators or executors, will take the trust property subject to the same equities as existed in favor of the *cestui qui trust* before such insolvency, bankruptcy or death, and his equity will have priority over the demands of the general creditors of the trustee or his transferee with notice.[15]

9. The foregoing rule will be enforced, whenever it shall have been ascertained by distinct proof that the fund impressed with the trust has passed into the estate represented by the trustee in liquidation, assignees, receivers, administrators or executors. But that rule will not be applied if it appear that the fund was disipated or destroyed by the person originally standing in the judiciary position before the same could have reached the hands of such representatives.[16]

10. The *cestui que trust* or trust creditor may follow and obtain in priority to general creditors trust moneys paid to a banker, although no longer existing *in specie*, as moneys numbered and ear-marked, but converted into a debt.[17]

Mo. 210, Peak v. Ellicott, 30 Kan. 156, and the first branch of Bank v. Weeins, 69 Tex. 489 have been dissented from upon the point tracing the trust fund into some "specific investment or fund" which came to the hands of a receiver or assignee. Still those American cases are founded upon the principle decided in Knatchbull v. Hallett as to subject a mixed fund consisting of trust money and the trustee's own money to a charge, and they are the law upon this point in the States where they were decided. For in New York, People v. Bank, 39 Hun, 187 and McCall v. Fraser, 40 *Id.* 111, follow People v. City Bank of Rochester. In Missouri, Harrison v. Smith, overruling Mills v. Post, 76 Mo. 426; 7 Mo. App. 519 was affirmed upon the point in question by Stoller v. Coates, 88 Mo. 514. In Wisconsin, McLeod v. Evans was followed by Francis v. Evans, 33 N. W. Rep. 93 (1887). In the latter case, however, the person standing in the fiduciary position, after fraudulently misappropriating the proceeds of the fund impressed with the trust failed at once upon the night of the day when the conversion took place so that the proceeds were perhaps easily traceable into the hands of his assignee.

[15] Knatchbull v. Hallett, 13 Ch. D. 696; Pennell v. Deffell, 4 De G. M. & G. 372; Frith v. Cartland, 2 H. & M. 417; *Ex parte* Cooke, 4 Ch. D. 123; *Ex parte* City Bank of New Orleans, 3 How. 292 (1845); Peck v. Jenness, 7 How. 612 (1849); Cooke v. Tullis, 85 U. S. 332, 341 (1873); Geatman v. Sav. Insti., 95 U. S. 764 (1877); Stewart v. Platt, 101 U. S. 731 (1879); Dudley v. Easton, 104 U. S. 99 (1881); Craigie v. Hadley, 99 N. Y. 131; Winter's Bank v. Armstsong, 33 Fed. Rep. 405; German Sav. Insti. v. Adel, 1 McCrary, 501.

[16] Knatchbull v. Hallett, 13 Ch. D. 719; Pennell v. Deffell, 4 De G. M. & G. 372, 389; Frith v. Cartland, 2 H. & M. 417, 420; *Ex parte* Hardcastle, *Re* Mawson, 44 L. T. (N. S.) 523. This, as has been seen, was a futile attempt to identify as the trust fund, a certain sum of money in the possession of a banking firm and claimed by trustees in liquidation. The court ruled "it to be absolutely necessary that in all cases like the present the existence of the fund in a distinct shape should be made out," and distinguished the case before it from Knatchbull v. Hallett. And in Carson v. Sloan, 13 L. R. (Ir.) Ch. D. 139, 147. Porter, M. R., said: "It is equally clear that when trust funds misapplied can be traced into particular investments or securities, the latter will be specially charged with their amount. In the case of a banker, Knatchbull v. Hallett, 13 Ch. D. 696; of a stockbroker: *Ex parte* Cooke, 4 Ch. D. 123; of a solicitor: Hopper v. Conyers, L. R. 2 Eq. 549; Middleton v. Pollock, 4 Ch. D. 49; and in numerous other cases of actual or constructive trust this has been a perfectly settled rule." To the same effect is Culham v. Stewart, 3 Can. L. T. 550 (1883). So that there is reason for the strictures placed upon certain American decisions already mentioned, by Philadelphia Nat. Bank v. Dowd, 38 Fed. Rep. 172, and Commercial Nat. Bank v. Armstrong, 39 *Id.* 684, 691, 692, where Jackson, J., said: "In seeking to follow and impress a trust character upon funds which an agent has misapplied, it is incumbent upon the principal to clearly trace such funds into the hands of the party against whom the relief is sought." "The burden of identification is imposed upon all owners seeking to follow their property or its proceeds. No well considered case has gone to the extent of holding that, when an agent converts or misappropriates his principal's property or funds, and thereafter fails, his general estate will be impressed with a trust for the reimbursement of such principal on the ground that such estate has been benefited, and to an equal amount, by the agent's breach of duty. Every creditor could rest a like claim to priority of satisfaction on the same ground." See also Illinois, etc. Bank v. First Nat. Bank, 15 Fed. Rep. 885; 21 Blatch. 275. What is said in the latter as coming from Whitecomb v. Jacob, 1 Salk. 161, and similar decisions was overruled in Knatchbull v. Hallett. In the following cases the trust fund was either held to have been dissipated by the trustee before it ever reached the hands of the receiver assignee, administrator or executor or there was not sufficient proof to trace the fund into the hands of such representatives: Cavin v. Gleason, 105 N. Y. 256 (1887); Steamboat Co. v. Locke, 73 Me. 514 (1882); Goodell v. Buck, 67 *Id.* 514 (1877); McLarren v. Brewer, 51 *Id.* 402; Thompson v. White, 45 *Id.* 445; Appeal of Hopkin's Exr. (Pa.), 9 Atl. Rep. 867 (1397); Thompson's Appeal, 22 Pa. St. 16 (1853); Cunningham's Est. 2 Am. L. Reg. (O. S.) 120 (1853); Jefferis's App. 33 Pa. St. 39 (1859); Abbott v. Reeves, 49 *Id.* 494 (1865); Wylie's and Quail's App. 92 *Id.* 196 (1879); People's Banks App. 93 *Id.* 107 (1880); William's App. 101 *Id.* 474 (1882); Segiun's App. 103 *Id.* 139 (1883;) Neely v. Roed, 54 Mich. 134 (1884). The second branch of Bank v. Weems, 69 Tex. 489; Bank v. Russell, 2 Dill. 215, 217 (1873); *Re* Janaway, 4 N. B. R. 100 (1874); *In re* Coan, etc. Mfg. Co., 12 *Id.* 203 (1875).

[17] Knatchbull v. Hallett, 13 Ch. D. 711, 752; Pennell v. Deffell, 4 De G. M. & G. 383. Under this point may be placed all of the American cases, already cited, in which moneys impressed with a trust were traced nto banks.

11. If money the proceeds of trust property is deposited by a trustee with bankers and is there placed to the credit of the trustee's private account and mixed confusedly with money in every sense the property of the trustee and standing to his credit in that account, and being so mixed is subjected to drawings out and payings in, the trust is impressed upon the mixed fund remaining in the bankers' hands in that mixed account to the full amount of the proceeds of the trust property, if it be that at no time the mixed fund has been reduced below that amount, or if the mixed fund has at any time been reduced below that amount, then to any lesser amount below which it can be shown the mixed fund has never been reduced and the *cestui que trust* or trust creditors may follow and obtain such balance in priority to general creditors.[18]

12. If, after a trustee has deposited trust moneys with his bankers and has there mixed the same with deposits of money in every sense his own, he draws upon the mixed deposits for his private purposes, it will be presumed that he has drawn out his own money, before that of the *cestui que trust*, even though the money of the latter may have been first paid in. And the balance mentioned in the next preceding rule will be determined according to the rule.[19]

In parting from the ancient doctrine that you could not follow money, because it had no ear-mark, it may be said that in recent times the demands of commerce have provided means for identifying and tracing money and its equivalents which have more than supplied the want of an ear-mark, and they are as well known in the courts as in the marts of trade.

How could what belongs to one person be so accurately distinguished from what belongs to another in this era of complicated and consolidated trade and finance, were it not for the numerous devices invented for that purpose by the government, the banks, clearing-houses, exchanges, carriers, elevators, warehousemen, pipe-lines and other like agencies?

The different qualities and quantities of property and commodities, and the characteristics incident to their changes in ownership or custody; from the producer to the manufacturer and then to the several classes of dealers; from hand to hand; from place to place; are all estimated and measured by their values in money. And these properties and commodities with their qualities, quantities and values are at every stage of their progress through the commercial world provided with an ear-mark of some kind, whether it be by an entry in a book of account,[20] or of record, or by some other symbol—a bank check, a bill of exchange, or promissory note, a bond, bill of lading, warehouse or elevator receipt, a clearing-house certificate, a gold or silver certificate, or what not. By such ear-marks do we follow, trace and identify money through its "transformations" and "ramifications," even "when mixed and confounded" in "an undivided and undistinguished mass of current money."[21]

[18] Knatchbull v. Hallett, 13 Ch. D. 696, 745; Pennell v. Deffell, 4 De G. M. & G. No case has so far arisen in this country for the application of this or the succeeding rule. See Van Alen v. American Nat. Bank, 52 N. Y. 1, 11.

[19] Knatchbull v. Hallett, 13 Ch. D. 696, 726 *et seq.*, departing on this point from Pennell v. Deffell, 4 De G. M. & G. 372, 384; Clayton's Case, 1 Mer. 572, 608; Brown v. Adams, L R. 4 Ch. 764 and some few other cases not regarded as of controlling authority, 13 Ch. D. 729, 730, 744.

[20] Even Mr. Justice Fry, who, in *Ex parte* Dale & Co., had felt himself bound to follow Whitecomb v. Jacob said, in Knatchbull v. Hallett, 13 Ch. D. 702: "The money arising from the sale of Mrs. Cotterill's Russian bonds, therefore, is as clearly ear-marked in the banker's account as it is possible to be by means of an entry."

[21] For earlier writings upon this subject, consult two articles by Mr. J. O. Pierce, 5 Cent. L. J. 51, 75 (1877); also two articles taken from the London Law Times, in 9 Chicago L. N. 111, 285 (1877).

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TRADE-MARKS — GOOD-WILL — FIRM NAME.

CASWELL V. HAZARD.

*New York Court of Appeals, June 3, 1890.*

1. *Trade-marks — Firm— Dissolution.*— Upon the dissolution of a firm, if its trade-marks and good-will are not disposed of, they may be employed by any member thereof in the prosecution of his business.

2. *Trade-marks—Firm Name.* — Such trade-mark may be the firm name.

3. *Dissolution of Firm—Use of Firm Name.*— At common law upon the dissolution of a firm, which has acquired a reputation for the goods sold by it, such members as desire to continue the business may do so under the old firm name, though none of the partners bear the names contained in the original firm.

4. *Trade-marks— Implements — Sale of.*— Where, upon retiring from a firm, a partner sells to the remaining partners property of the firm, bearing its name printed or impressed thereon for use in their

business, he must intend that such property shall be thereafter used and sold by the vendees in their business as successors to the former firm.

RUGER C. J.: We think the case of Hazard v. Caswell, 93 N. Y. 259, is a controlling authority on this appeal upon the question of the respective rights of the plaintiff Casswell and the defendant Rowland N. Hazard in the use of the name of "Caswell" as a trade-mark in a business carried on by either of them. It was there held, upon the dissolution of a firm having established trade-marks and a good-will, which had not been disposed of or transferred upon such dissolution, that such assets remained the property of the individual members, and could lawfully be employed by either of such members in the prosecution of his business. It was further determined that the dissolution of the partnership of Caswell, Hazard & Co., in 1876, and the transfers and agreements then made between the partners, did not dispose of the trade-marks of the firm, and that John R. Caswell and Rowland N. Hazard each possessed the right thereafter to use and employ those formely belonging to the firm as he desired to do without infringing upon the rights of the other. We are entirely satisfied with the correctness of that decision, and feel no disposition to impair its force as an authority upon the questions there decided. Although I did not concur in that decision, my dissent did not proceed upon any doubt as to the soundness of the principle above stated. We think the facts in this case bring it directly within the operation of the rule there laid down. Both the plaintiff John R. Caswell and the defendant Rowland N. Hazard were, on July 31, 1876, for 10 years previously thereto had been, members of the firm of Caswell, Hazard & Co., carrying on business of manufacturing and selling, in Newport and New York, drugs, etc., and during that time, as such firm, used and enjoyed all the privileges which are now claimed by the respective parties to this action. It would seem, therefore, to follow as a matter of course that either of the members of such firm could after its dissolution lawfully use its trade-marks in any business thereafter carried on by him.

A brief history of the organization of that firm, and its mode of prosecuting business, exhibits the relation these parties, respectively, bore to the trade-marks of the firm at the time this suit was commenced. Previous to the year 1867, the several names of "Caswell" and "Hazard" had been prominent in the trade of manufacturing and selling drugs and medicines, and other articles connected with such trade, in the cities of Newport, R. I., and New York. The business originally started at Newport as early as 1821, and was there carried on until some time previous to 1867, when a branch was opened in the city of New York. The names of "Caswell" and "Hazard" had, subsequent to the year 1821, been continuously used in such trade, either in conjunction or separately, but always in some firm regularly succeeding a prior firm. It is of but little importance what position either of these parties bore to such business previous to 1867, as in that year all their rights were merged in a new firm then organized. In that year the name of "Caswell, Hazard & Co." was first used, and that firm regularly succeeded to all of the rights, interests, and reputation which those names, or either of them, had previously acquired in the public estimation both in the cities of Newport and New York. This firm consisted of Philip Caswell, Jr., Rowland N. Hazard, the defendant, and John R. Caswell, one of the plaintiffs herein. Philip Caswell, Jr., owned 14-30, Rowland N. Hazard 9-30, and John R. Caswell 7-30, of the firm assets. Philip Caswell, Jr., retired from this firm in 1872, transferring, with the consent of John R. Caswell, all his interest and good-will in such firm to Rowland N. Hazard, and covenanting that he would not within 20 years go into the business of druggist or apothecary in either of the cities of Newport or New York. He also took a covenant from Hazard indemnifying and protecting him from all loss or liability from existing debts or the future liabilities of the succeeding firm. This purchase gave Hazard a largely preponderating interest in the assets of the firm. Upon the retirement of Philip Caswell, Jr., a new firm, composed of Rowland N. Hazard, John R. Caswell, and John C. Hazard, was formed to continue the business of Caswell, Hazard & Co., at the former places of business of that firm. In the new firm, Rowland N. Hazard retained an interest of 16-30, John R. Caswell 7-30, and John C. Hazard acquired an interest of 7-30. The new firm took the necessary proceedings, and published the advertisements, required to entitle them to continue business under the firm name of "Caswell, Hazard & Co.," according to the provisions of chapter 400 of the Laws of 1854. On July 31, 1876, this firm was dissolved by mutual consent, whereupon John R. Caswell sold and transferred to its remaining members his interest in the property of the firm except its trade-marks, and a part of the retail stock in trade, which was proportionately divided between the partners. Among the articles thus transferred was the real estate at Newport in which the business of the firm had theretofore been carried on at that place, the fixtures in the various stores occupied by them in New York, and all signs, labels, bottles and bottle moulds theretofore used in the business. These goods had the firm name of "Caswell, Hazard & Co." either painted or printed upon them, or blown into the bottles thus transferred. The defendants also assumed the unexpired leases of the various places of business in New York where the business had been previously conducted, and agreed to collect and settle the outstanding accounts and debts of the old firm, and purchased of Caswell the prescription books theretofore used in the firm, and became the legitimate successors to such firm. The plaintiffs, for several years after the sale,

bought goods, received payments from, and did business with, the new firm of Caswell, Hazard & Co. under that name. The defendants, upon the retirement of John R. Caswell and the formation of this new firm, took the necessary steps to enable them to continue business under the firm name of Caswell, Hazard & Co., as the successors of the former firm of that name, according to the provisions of chapter 400 of the Laws of 1854, and from that time until 1886 continued and carried on their business at all the former places of business occupied by Caswell, Hazard & Co. without interruption or disturbance from any one. John R. Caswell afterwards formed a partnership with one Massey under the firm name of Caswell & Massey, and in November, 1876, opened a drug-store in New York near one of the defendants' stores, and continued thereafter to prosecute such business under such firm name, or others similar thereto. At the expiration of nearly 10 years from his withdrawal from the firm of Caswell, Hazard & Co., John R. Caswell, in behalf of his firm, began this suit, claiming the exclusive right to use the name of "Caswell" in connection with the conduct of the business of manufacturing and selling drugs, etc., in the city of New York and elsewhere, and asking that the defendants be perpetually enjoined from using such name in any way in the prosecution of such business. The court at special term gave judgment awarding the plaintiffs an injunction to the full extent claimed against the defendants; and this judgment, on appeal to the general term, was reversed both upon questions of law and of fact, and a new trial was ordered. The plaintiffs appealed from such order to this court upon a stipulation for judgment absolute in case such order should be affirmed.

On such an appeal, if the record presents any error, either of law or of fact, made by the trial court, which called for a reversal of its judgment, the order of the general term must necessarily be affirmed by this court. The extreme danger which parties having a cause of action, and having recovered a judgment therefor, incur by appealing from an order granting a new trial to this court, has been too frequently pointed out in its decisions to need further remark; and it would seem that no amount of admonition is sufficient to discourage parties from constantly taking such appeals. Cobb v. Hatfield, 46 N. Y. 533. A single consideration pointed out in the opinion of the court at general term serves to show that the reversal in this case was properly ordered, if for no other reason than because the judgment rendered by the trial court absolutely prohibited the defendants from making any use of the signs, labels, bottles, and bottle molds bearing the name of "Caswell, Hazard & Co.," sold to them by John R. Caswell. This decision tended to destroy the value of property sold expressly for use in the business intended to be carried on by the defendants, and obviously exceeded any legal claim which the plaintiffs could lawfully maintain. The claim made by the plaintiffs in this action is sought to be sustained under an alleged right existing in favor of John R. Caswell to the exclusive use of the trade-marks, including the use of the name of "Caswell," formerly employed by the firm of Caswell, Hazard & Co. in their business. In discussing the case, it is therefore necessary to refer only to the rights secured by John R. Caswell and Rowland N. Hazard, respectively, as members of the firm of Caswell, Hazard & Co., as it is through such interests that both the plaintiffs and defendants now claim to derive their respective rights. Much stress was laid on the argument upon the rights acquired by Rowland N. Hazard through the purchase made in 1872 from Philip Caswell, Jr., of his interest and good-will in the firm of Caswell, Hazard & Co. We do not think a consideration of the effect of that purchase is very important in this case, as it cannot be claimed that Hazard thereby acquired any right in the assets or good-will of such firm which then or afterwards belonged to John R. Caswell. He could have acquired an exclusive right to the use of such property only by virtue of a transfer to him by all of the parties interested therein; and, so long as an outstanding right in such property existed in favor of any one, he could not maintain an exclusive right thereto. It also seems unnecessary to consider the prior rights, interests, and reputation of the individual members of such firms, as upon the organization of the firm they became merged therein, and by its continued user and enjoyment became its property, and dissolution belonged in common to its respective members, according to their respective interests in such firm. The trial court found that the firm of Caswell, Hazard & Co., during its existence from 1871 to 1876, transacted a very extensive business in New York city and Newport and throughout the United States, and also in Europe, as chemists, apothecaries, druggists, manufactures of and dealers, both at wholesale and retail, in drugs and medicines, and as owners, proprietors, and manufacturers of many proprietary medicinal remedies, toilet articles, preparations, and compounds. This finding seems to be entirely in accordance with the proof in the case, and is of controlling force in the determination of the rights of the respective partners in the trade-marks and assets of that firm.

These facts seems to present two decisive questions for determination in the case: *First*, whether John R. Caswell, upon retiring from the firm of Caswell, Hazard & Co., in 1876, succeeded to the exclusive right of using the name of "Caswell" as a firm name in connection with the prosecution of the business of thereafter manufacturing and selling drugs, medicines, etc., in the cities or New York and Newport; *second*, whether he then succeeded to the exclusive right of using the name of "Caswell," either alone or in connection with others, as a trade-mark in carrying on such business. It is essential that the plaint-

iffs should successfully maintain the affirmative of both of these propositions in order to sustain this appeal, for, if the defendants had any right to use the name of "Caswell," either as a firm name or as a trade-mark, it is obvious that the judgment rendered by the trial court was erroneous to a certain extent, and was properly reversed by the general term. It seems to us quite clear that the plaintiffs have failed to maintain either of these claims. The right which every person has to use his own name in the prosecution of his business cannot be disputed; and this right can be limited or controlled only when such name has become the trade-mark or business sign of another, and is being used to deceive the public, or defraud the person who made it valuable. Devlin v. Devlin, 69 N. Y. 212; Meneely v. Meneely, 62 N. Y. 432. Conceeding, therefore, the right of Jahn R. Caswell to use his own name, and the trade-marks of the firm of Caswell, Hazard & Co., in his business, it falls far short of securing to him the right to the exclusive use of the name of "Caswell," which has been largely made valuable in trade by the capital, skill, and enterprise of others. From 1867 to 1872 that name, in the firm of Caswell, Hazard & Co., mainly represented Philip Caswell, Jr.; and the defendant Rowland N. Hazard succeeded by assignment to all his rights in that firm. There is therefore no foundation for the claim of John R. Caswell that he succeeded in any respect to the rights or reputation which Philip Caswell, Jr., acquired in the business of Caswell, Hazard & Co. Rowland N. Hazard, by his purchase, acquired all such rights as could lawfully be enjoyed by any purchaser, and in addition thereto possessed the rights belonging to himself as a member of the various firms doing business under the firm name of Caswell, Hazard & Co. The right of Rowland N. Hazard to use the trade-marks and signs of Caswell, Hazard & Co. seems to rest as securely upon those which he acquired as a member of such firms as upon the rights transferred to him by the several members of such firm. The right to a trade-mark is derived from its appropriation and continued user, and becomes the property of those who first employed it, and give it a name and reputation. Devlin v. Devlin, 69 N. Y. 212; Coleman v. Crump, 70 N. Y. 578. It becomes part of the assets of the firm by which it was used and established, and can be owned, transferred, and sold like other species of property. Upon the dissolution of a firm which has acquired its proprietorship, it must be sold and its proceeds distributed like other firm assets; and, if not so disposed of, it remains the property of the individual members of the dissolved firm, and may lawfully thereafter be used by any or either of such members desiring to continue the prosecution of the business in which it has theretofore been used. Huwer v. Dannenhoffer, 82 N. Y. 500; Hazard v. Caswell, *supra*. Assuming, therefore, the correctness of plaintiff's claim that, upon the dissolution of the firm of Caswell, Hazard & Co., in 1876, there was no transfer by either party to the other of the right to use its trade-marks and firm name, yet the right thereafter to use its trade-marks then became vested in the individual members of such firm, and could be lawfully employed either without trespassing upon the rights of the other. This proposition, as we have seen, was expressly held in the case of Hazard v. Caswell, between these same parties. That case depended, substantially, upon the state of facts existing in this case, and the present defendants then claimed the right to restrain the plaintiffs from using either the name of "Caswell," or the trade-marks formerly used by the firm of Caswell, Hazard & Co., in manufacturing and putting upon a certain description of cologne. They claimed a right to the exclusive use of such name and trade-mark by reason of the various transfers of property made to them by Philip and John R. Caswell, and sought to restrain Caswell from the use of his own name. It was held that neither party secured an exclusive right to the use of such trade-marks by reason of such transfers, and that, upon the dissolution in 1876 of the firm of Caswell, Hazard & Co., in the absence of any disposition of such property, either of the members of such firm had the right to make use of them in his separate business. That decision seems to be conclusive as to the main question here involved, and renders the question of the right to use the name of "Caswell" as a trade-mark in connection with the business of manufacturing and selling drugs and medicines by either of the former partners *res judicata* as between such parties. See, also, Huwer v. Dannenhoffer, 82 N. Y. 500. Even if this were not so, it seems difficult to resist the conclusion that John R. Caswell, by the sale and transfer to Caswell, Hazard & Co., in 1876, of the property of the old firm bearing the name of "Caswell, Hazard & Co." indelibly printed or impressed thereon, for use in their business, knew and intended that such property, at least, should be thereafter used and sold by the vendees in their business as successors to the former firm. The fact that it could be so used was the only apparent inducement for its purchase by the defendants; and this must have been known and understood by John R. Caswell, and he could not thereafter claim that, so far as that property was concerned, it was used without his permission.

We are also of the opinion that the present defendants have, as a legitimate successors to the former firms of Caswell, Hazard & Co., lawfully acquired the right to use that name as a firm name. At common law, it was undoubtedly the right of such members of a dissolved firm which, having acquired an established reputation for the character and quality of the goods manufactured and sold by them, who desired to continue such business, to continue the former firm name, and transact business thereunder, although none of such partners bore the names contained in the original firm. Leather Cloth Co. v. American,

etc. Cloth Co., 4 De Gex, J. & S. 143, as affirmed in 11 H. L. Cas. 534. Under the provisions of chapter 281 of the Laws of 1833, however, such right is now attainable in this State only by a compliance with the requirements of chapter 400 of the Laws of 1854. These acts do not assume to confer upon the members of a continuing firm any rights of property possessed by the members of the dissolved firm; but they do provide that under certain conditions, and taking certain proceedings, the members of a succeeding firm may continue business under the former firm name, although no person in such succeeding firm bears the name of any of the retiring members of the original firm. Upon the retirement of Philip Caswell from the firm of Caswell, Hazard & Co., in 1872, as well as upon the withdrawal of John R. Caswell, in 1876, the defendants or their predecessors took all of the necessary proceedings required under the statute nf 1854 to entitle them to continue business under the firm name of Caswell, Hazard & Co., and they have continued such business by virtue of such proceedings, under that firm name, without interruption or molestation, from 1872 to 1886, and we can see no reason why they did not thereby become lawfully entitled to use such name.

The publication of the notices in 1872 could have had no other object than to invest Rowland N. Hazard with the right to the continued use of of such firm name. There was no necessity for the firm formed in 1872 to resort to those proceedings to authorize them to use the name of "Caswell" in their firm name, because it was then represented by one of the partners; and the only object of such proceedings seems to have been to perpetuate the name and reputation which the former firm had acquired for the benefit of the several members of the new firm. A similar object would seem to have instigated the subsequent publication in 1876; and the right to make such publication does not, under the statute, seem in any respect to depend upon the knowledge or assent thereto of the retiring members. The statute appears to confer the absolute right to perpetuate the firm name upon the person succeeding to the business of a dissolved firm provided they have business relations with foreign countries, and desire to continue such business. A possible question might arise as to the liability of a retiring member for the subsequent transactions of the succeeding firm; but there has been no such claim raised in this case, and after the lapse of 10 years it would seem to be quite too late to present it, if it ever existed. It is now claimed that any such question is involved; but the action is sought to be supported upon the sole ground that no person bearing the name of "Caswell" is now represented in such firm. The objection to the use of the name of "Caswell" is founded wholly upon the prohibition contained in the act of 1833, and takes no account of the exception to such prohibition introduced by the act of 1854. Some difficulty in administering this act might arise in a case where there were conflicting claims between the several members of a dissolved firm as to the right to continue the use of the old firm name; but no such question arises here, as John R. Caswell was in no sense the successor of such firm, and never attempted to use their name or continue their business. He not only abandoned all claim to continue the use of the old firm name, or of succession to its goodwill, so far as it was affected by the places of doing such business; but, by his subsequent dealing with the defendants, seemed to acquiesce in their appropriation of such name.

Some foundation for the plaintiffs' claim is supposed to have been found in the opinion of this court in the former case of Hazard v. Caswell. It is sufficient to say that the question was not there involved, and could not have been decided. The sole question there presented was whether Rowland N. Hazard acquired the exclusive right to use the name of "Caswell," in connection with others, as a trade-mark in the manufacture and sale of certain description of cologne; and it was held that he had not, and that the right to such use rested equally in both Caswell and Hazard as members of such firm.

We are, for the reasons stated, of the opinion that the plaintiffs failed to established the cause of action stated in their complaint, and that the order of the general term should therefore be affirmed, and judgment absolute ordered for defendants, with costs in all courts. All concur.

NOTE.—*Good-will — Trade-marks.* — Good-will is defined to be any possible advantage that has been acquired by a person or a firm in the progress of business, whether connected with the premises in which the business is carried on or with the name of the person or firm, or with any other matter carrying with it the benefit of the business.[1] A trade-mark is a part of the good-will of a business.[2]

*Trade-marks—What may be Used.*—No word, mark or devise can be used as a trade-mark, which denotes merely the nature, kind, quality or characteristics of an article,[3] or the qualities of a preparation.[4] An arbitrary name from a foreign language, adopted to indicate a certain quality of flour according to the judgment of such party, is entitled to be protected as a trade-mark.[5] When a patented article has acquired a name, which designates a mechanism or a peculiar construction, parts of which are protected by patents, other persons after their expiration have a right to construct the machine and call it by that name, because that only expresses the kind and quality of the machine. This rule has been applied to "Singer" Sewing Machines,[6] Weymouth's Patent[7] and Goodyear Rubber.[8] When a word used as a trade-mark

[1] Menendez v. Holt, 128 U. S, 514.

[2] *Idem;* Young v. Jones, 3 Hughes, 274.

[3] Burke v. Cassin, 45 Cal. 467; Indurated F. Co. v. Amoskeag, etc. Co., 37 Fed. Rep. 695; Brown C. Co. v. Stearns, 37 Fed. Rep. 360; Manufacturing Co. v. Trainer, 101 U. S. 51; Pratt's Appeal, 117 Pa. St. 401.

[4] Rumford C. W. v. Muth, 35 Fed. Rep. 524.

[5] Menendez v. Holt, *supra.*

[6] Singer M. Co. v. June M. Co., 41 Fed. Rep. 208.

[7] Holt Co. v. Wadsworth, 41 Fed. Rep. 34.

[8] Goodyear's R. G. M. Co. v. Goodyear R. Co., 128 U. S. 593.

subsequently becomes the common appellation of the article, other persons can use the word to designate the product, but they cannot apply it as a trade-mark, that is, they cannot stamp it on the articles.[9] A trade-mark may consist merely of the name of the manufacturer.[10] So it may consist of any words used to designate the article, when they are not merely descriptive of the quality or characteristic of such article.[11] A party, however, will not be allowed by the adoption of a trade-mark, which is untrue and deceptive, to sell his own goods as those of another, thus injuring such person and the public.[12] When a person manufactures an article in one city and brands it with the name of another city, and such article is of an inferior quality, since such action has a tendency to deceive the public and injure the manufacturers of such other city, he will be enjoined from so doing.[13] The mere name of a person or of a place cannot as a general rule be appropriated as a trade-mark, so as to prevent another person, having the same name or residing in the same place, from using it.[14] Two parties with the same name may each use his name in his trade-mark.[15]

*Sale of Trade-mark.*—The right to use a trade-mark may be lawfully transferred with the business.[16] When the trade-mark is affixed to articles manufactured at a particular establishment and acquires a special reputation in connection with the place of manufacture, and that establishment is transferred, either by contract or operation of law to others, the right to the use of the trade-marks may be lawfully transferred with it.[17] When a trade-mark, which contains an individual's name, means that such articles are made under his personal supervision or work, it is unassignable, because its use then would be a fraud on the public, which the courts will not aid. Where, however, the usages of trade are such that no such inference would be drawn from the use of a trade-mark containing a proper name, and the only inference drawn would be that the goods are of a certain standard, kind or quality, or one made in a certain manner after a certain formula by persons carrying on the business formerly carried on by the person whose name is on the trade-mark, a sale thereof will be protected.[18] A business and its accompanying trade-mark may pass from a parent to his children without administration, and the business may be divided among the children, and each can use the trade-mark to the exclusion of all the world except his co-heirs.[19] In the absence of express stipulations at the time of the dissolution of a firm, each partner may go on and use the trade-marks of the firm.[20] This is very clearly the doctrine adopted in New York, as announced in the principal case.[21] Other courts have qualified this doctrine to a certain extent. Where a partner retired from a firm, and assented to or acquiesced in the retention of the other partners of possession of the old place of business and the future conduct of the business by them under the old name, it was held that the good-will remained with the latter as of course.[22] Where a person, a member of a firm, which prepared an article on which it put its trade-mark, purchases its business, he may properly state on his labels that the article is prepared by such firm.[23]

*Purchase of Implements.*—When a trade-mark is intended to designate an article made by a certain machine, one who purchases such machine may use it till it is worn out, and may put the trade-mark on the articles produced.[24]

9 Celluloid M. Co. v. Cellonite M. Co., 32 Fed. Rep. 94.
10 Pratt's Appeal, *supra;* Burke v. Cassin, 45 Cal. 467.
11 Holt Co. v. Wadsworth, 41 Fed. Rep. 34.
12 Anheuser-Busch B. Co. v. Piza, 24 Fed. Rep. 149.
13 Southern W. L. Co. v. Coit, 39 Fed. Rep. 492; Southern W. L. Co. v. Cary, 25 Fed. Rep. 125.
14 Pratt's Appeal, *supra.*
15 Rogers M. Co. v. Simpson, 54 Conn. 527; Rogers v. Rogers, 53 Conn. 121.
16 Kidd v. Johnson, 100 U. S. 617.
17 *Idem.*
18 Hoxie v. Chanie, 143 Mass. 592.
19 Pratt's Appeal, *supra.*
20 Young v. Jones, 3 Hughes, 274; Taylor v. Bothin, 5 Sawy. 584; Weston v. Ketcham, 7 Jones & S. 54; Wright v. Simpson, 15 Off. Gaz. 968.
21 Huwer v. Dennenhoffer, 82 N. Y. 499.
22 Menendez v. Holt, 128 U. S. 514.
23 Jennings v. Johnson, 37 Fed. Rep. 364.
24 Martha, etc. Co. v. Martien, 37 Fed. Rep. 797.

## JETSAM AND FLOTSAM.

REPLEVIN FOR A CELESTIAL BODY.—The Western Union (Iowa) *Gazette* says: "All northern Iowa was startled last Friday afternoon, about 5 o'clock, by the appearance of a monster meteor, sailing through the air with a terrifying hissing and followed by a fierce flame. It struck twelve miles north of Forest City, and as it collided with the earth there was a report like a cannon and the earth trembled as from a shock of an earthquake. When the people of the neighborhood recovered their senses they started *en masse* in search of meteorites, finding many small pieces. The largest fragment was buried three feet under ground, and was to hot to handle when uncovered. It weighed 70 pounds. The finder sold it for $100, but the owner of the land laid claim to it, replevied it from the purchaser, and the prospects is favorable for a long lawsuit over this strange visitor." This is the first instance which has come to our knowledge of replevin being brought to recover possession of one of the heavenly bodies. The question to whom such a strange visitant belongs, when it descends upon the earth like Lucifer, Son of the Morning, is certainly a curious judicial question. Does it belong to the owner of the land upon which it alights? If so, upon what principle? In this case, as the largest fragment was buried three feet under ground, the plaintiff might well contend that it had become thereby a part of his land, and that when it was, by the tortious act of the defendant, severed from the soil, it was converted from real into personal property; but without changing the plaintiff's proprietary right to it. The plaintiff will probably recover, and this will probably be the ground on which the decision will turn.—*American Law Review.*

## QUERIES.

### QUERY NO. 4.

A, B and C owned a tract of land in common. A and B together owned the undivided 2-9 and C the undivided 7-9. The tract is assessed altogether as 80 acres, and the valuation is on the 80 acres. C goes to the collector and pays the taxes on the undivided 7-9, leaving the taxes still due on the undivided 2-9. The collector brings suit against A and B under the back tax law of Missouri, asking that the taxes due from A and B on the undivided 2-9 be declared a lien on their part, to-wit: the undivided 2-9, and that said undivided 2-9 be sold. Can the collector enforce the law under the above statement of facts? Quote authorities under Missouri law. B.

## WEEKLY DIGEST

**Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.**



1. ADMINISTATORS.— In an action for the recovery of real estate, where defendant's title was based upon an administrator's sale and deed, the record of the probate court did not show any petition for the appointment of the administrator except the statement, in the order of appointment, that on a certain day the petition came on to be heard: *Held*, that it would be presumed that the probate court had jurisdiction, and that sufficient facts were before the court to authorize the appointment of the administrator.—*Mills v. Herndon*, Tex., 13 S. W. Rep. 854.

2. ADVERSE POSSESSION—Evidence.— In an action for the recovery of land, where defendant claims title by adverse possession, a tax-deed under which he claims is properly admitted in evidence to show the basis for adverse possession, although by reason of its irregularities it is insufficient as evidence of title.—*Seemuller v. Thornton*, Tex., 13 S. W. Rep. 846.

3. APPEAL. — In trover, for goods seized on attachment, by one claiming to be a purchaser, who alleges that the debt for which the goods were attached was fraudulently contracted, objections to evidence to show that the sale to plaintiff was in fraud of creditors cannot be considered on appeal where not raised below —*Stevenson v. Waltman*, Mich., 45 N. W. Rep. 825.

4. ATTACHMENT—Special Constable.— Code Ala. § 2956, authorizing an attachment issued by a justice for a sum exceeding his jurisdiction, and returnable in the circuit court, to be levied by the constable in whose beat the process issued, provided the amount does not exceed the amount of the constable's bond, refers only to the regular constable; and such a levy by a special deputy is void.—*Carter v. Palmer*, Ala., 7 South. Rep. 31.

5. ATTACHMENT — Waiver. — A creditor who claims a fund resulting from the sale of attached property cannot question the existence of the grounds of attachment. That right belongs to the attachment debtor alone.—*First Nat. Bank v. Greenwood*, Wis., 45 N. W. Rep. 810.

6. BANKS AND BANKING.—Checks and drafts sent from one bank to another were indorsed "for collection," and credited "subject to payment," according to the dealing between the banks. Part of them were paid to the receiver of the latter bank after its failure, and the balance were credited to it by the payors: *Held*, that the amount paid the receiver should be accounted for as a trust fund, but the balance as a general debt.—*First Nat. Bank v. Armstrong*, U. S. C. C. (Ohio), 42 Fed. Rep. 193.

7. BIGAMY—Presumption. — The presumption that a person is still living, arising from the fact that he was alive at a former date, is one not of law but of fact, of varying strength, according to circumstances. The fact that he was alive at a particular time is but one of the facts to be considered in determining whether he was alive at a given future date, the probative force of which will depend upon accompanying circumstances. —*State v. Plym*, Minn., 45 N. W. Rep. 848.

8. BROKER—Commissions.—The rights and duties of a broker employed to secure a loan depend upon the same principles which govern the broker who undertakes to find a purchaser of property. He is entitled to his commissions when he has procured a lender ready, willing, and able to lend the money upon the authorized terms.—*Peet v. Sherwood*, Minn., 45 N. W. Rep. 859.

9. CARRIERS—Connecting Lines.—In transportation of goods over connecting lines of railroad, when there is no special contract, each road is only liable to the extent of its own line, and for safe carriage and delivery to the next road. — *Savannah, etc. Ry. Co. v. Harris*, Fla., 7 South. Rep. 544.

10. CHATTEL MORTGAGE—Description. — A description in a chattel mortgage: "95 head of steers, one year old this spring, marked as follows: Right ear cropped, and notch cut out of the under side of the left—being the said cattle I have this day purchased of Welcome Mowry, being all the cattle I have now thus marked. Said cattle are to be kept in Seward Co., Neb., except during the herding season, in which they are to be kept in Butler Co., Neb."—is sufficient. — *Buck v. Davenport Sav. Bank*, Neb., 45 N. W. Rep. 776.

11. CITATION—Return.— Where a sheriff's return on a citation does not conform to the requirements of law the judgment will be reversed, and case remanded. — *O'Hara v. Independence Lumber & Imp. Co.*, La., 7 South. Rep. 533.

12. CLAIMS—Consideration.—In the absence of formal pleadings in the case of claims against an estate based on notes and accounts aggregating the value of the estate, which were disallowed by the commissioners and appealed to the circuit court, evidence of the solvency of decedent and insolvency of plaintiff at the times the notes were given is admissible, as tending to establish the defense of want of consideration.— *Wilson v. Estate*, Mich., 45 N. W. Rep. 838.

13. COMPROMISE—Consideration—Costs.—In an action by a constable against a county for his fees, a written agreement by which plaintiff, for a certain sum, releases all claim against defendant, cannot, in the absence of any claim to reform the contract, be varied by parol evidence that defendant exacted as a condition of the settlement that plaintiff should resign his office.—*Potts v. Polk County*, Iowa, 45 N. W. Rep. 775.

14. CONDITIONAL SALES — Evidence. — A recital in a note, given as part payment on a sale of a span of horses, that "said horses are to be holden to [the seller] as security for the payment of this note," is not so certain and unambiguous as to import a mortgage of the horses, and not a conditional sale; and parol evidence is admissible, as against a chattel mortgagee of the purchaser, to show the real agreement of sale. — *Kendrick v. Beard*, Mich., 45 N. W. Rep. 837.

15. CONDITIONAL SALE—Payment.—Where, on a sale of a horse, it is agreed that title shall not pass until the purchase money is paid, the giving of a note for the balance will not change the title, in the absence of ex press agreement.— *Wilten v. Levan*, Penn., 19 Atl. Rep. 945.

16. CONSTITUTIONAL LAW—Insane.—Under Code Iowa, § 1400, as to adjudication of insanity, no provision is made for service of notice upon him in such case, but in all cases a practicing physician must make a personal examination, and certify his finding to the commissioners, and any person may appear and contest the question of sanity: *Held*, that one who is thus adjudged insane without notice, and committed to an asylum, is not deprived of his liberty without due pro-

cess of law. — *Chavanees v. Priestly*, Iowa, 45 N. W. Rep. 766.

17. CONSTITUTIONAL LAW— Titles of Acts. — An act of the legislature is not repugnant to the provisions of § 27, art. 4, of the constitution, because it embraces, technically, more than one subject (one of which only is expressed in the title), so that they are not foreign and extraneous. — *State v. Madison*, Minn., 45 N. W. Rep. 856.

18. CONTRACT—Evidence.—In an action against a land company for the price of trees set out under a contract with it, the acts and declarations of its secretary are admissible to show that the trees was such as the contract contemplated, where it is shown that he was on the ground when they were planted, and selected many of them himself.— *Des Moines, etc. Co. v. Polk County, etc. Co.*, Iowa, 45 N. W. Rep. 773.

19. CONTRACTS — Joint and Several. — In an action against joint defendants for the balance on a contract to cut and deliver logs, evidence that both accepted plaintiff's written bid, though only one signed the formal contract afterwards drawn up, and that defendant, who did not sign, instructed his co-defendant, to execute it on his behalf, and held himself liable to plaintiff for whatever should become due him on the contract, is sufficient to go to the jury as to the liability of defendant whose signature was omitted.— *McPhee v. Sullivan*, Wis., 45 N. W. Rep. 808.

20. CONTRACT—Mistake.— Plaintiff took stone from a quarry, which both parties erroneously supposed belonged to defendant, under a contract that plaintiff should deliver to defendant a certain per cent. of the stone: *Held*, that plaintiff, never having been deprived of the stone received by him, could not recover for that given defendant on the ground of want of consideration.—*Steelve v. Schanez*, Iowa, 45 N. W. Rep. 870.

21. CONTRACTS—Part Performance.—To entitle a party to recover for part performance or for performance in a different way from that contracted for, his contract remaining open and unperformed, the circumstances must be such that a new contract may be implied from the conduct of the parties to pay a compensation for the partial or substituted performance. The mere fact that the partial performance is beneficial to a party is not enough from which to imply a promise to pay for it.—*Elliott v. Caldwell*, Minn., 45 N. W. Rep. 845.

22. CONTRACTS — Receipt. — Taken and construed in connection with several allegations and admissions set out and contained in the pleadings, the following paper writing set out in defendant's answer, to-wit: "Received from C. P. Treat $6,532.27 in full settlement of the within contract, and in full of all demands. In consideration of said payment already received by me, I hereby release him, and also the Fremont, Elkhorn and Missouri Valley R. R. Co., and the Chicago and Northwestern Ry. Co., from all claims, actions, or causes of action, which have arisen or may or can arise to me against any or either of them by reason of any connection I may have had with them heretofore:" *Held*, to be a receipt, and not a contract.—*Price v. Treat*, Neb., 45 N. W. Rep. 790.

23. CONVEYANCE BY GUARDIAN. — The approval and confirmation of the probate court indorsed upon or annexed to a conveyance by a purported guardian to a railway company, pursuant to Gen. St. 1878, ch. 57 § 36, is no proof that the person who executed the conveyance was such guardian.—*Burrell v. Chicago, etc. Ry. Co.*, Minn., 45 N. W. Rep. 849.

24. CONVEYANCE ON CONDITION.—Plaintiff induced defendant, his niece, to move, with her family, from another State, and accept the conveyance of a farm, on condition that plaintiff should live with her and be furnished his board and washing and "a pleasant home." It was shown that the conditions were complied with, except that his home was not made pleasant, but this was largely owing to plaintiff's own irritability and unseemly behavior: *Held*, that the conveyance would not be set aside as for condition broken, its performance being rendered impossible by plaintiff's own acts. — *Leonard v. Smith*, Iowa, 45 N. W. Rep. 762.

25. CORPORATIONS—Appearance.—In an action against a foreign corporation, the citation was served upon the corporation, in its own State, by delivery to the president of the corporation. The corporation answered by pleas to the jurisdiction, on the ground of non-residence and substituted service, and, reserving its right thereunder, filed a plea to the merits: *Held*, that its voluntary appearance by plea to the merits was a waiver of the objection to the jurisdiction. — *St. Louis, etc. Ry. Co. v. Whitley*, Tex., 13 S. W. Rep. 853.

26. CORPORATION—Stock Subscription. — In an action on notes for the balance due on subscriptions to the capital stock of a railway company which was never issued to the subscribers, it appeared that the notes were payable when the cars should be running between certain points, and were given to aid the company in raising funds with which to complete the road between those points, which was not done for fourteen years: *Held*, there could be no recovery, as that was an unreasonable time to allow for its completion. — *Blake v. Brown*, Iowa, 45 N. W. Rep. 752.

27. COUNTY CLERK—Fees.— It is the duty of a county clerk to report all the fees of his office, and pay the excess over the amount to which he is entitled into the county treasury.—*State v. Shearer*, Neb., 45 N. W. Rep. 784.

28. COVENANT—Warranty—Evidence.— In an action to recover for breach of covenant against incumbrances in a deed conveying lands for one entire pecuniary consideration expressed in the deed, and actually paid, evidence is not admissible, in defense, of a prior parol agreement to the effect that as to a part of the granted land, upon which an incumbrance rested, that consideration was not applicable, but that the conveyance was gratuitous.—*Bruns v. Schreiber*, Minn., 45 N. W. Rep. 861.

29. CRIMINAL EVIDENCE—Accomplice.—It was error to charge that the testimony of a person aiding and abetting a crime "is admissible; yet such evidence, when not corroborated by the testimony of others not implicated in the crime, as to matters material to the issues, ought to be received with great caution," without explaining the meaning of "matters material to the issues," and stating that the corroboration must go to the extent of identifying the person of the prisoner against whom the accomplice speaks. — *State v. Miller*, 13 S. W. Rep. 832.

30. CRIMINAL EVIDENCE—Rape.— Evidence admissible in cases of rape. — *McMurrin v. Rigby*, Iowa, 45 N. W. Rep. 877.

31. CRIMINAL LAW.— A motion in arrest of judgment, by the principal convicted defendant, that the indictment charging his acquitted co-defendants, as accessories, is fatally defective, as they ought to have been prosecuted as principals, is quixotic and unworthy of notice.—*State v. Butler*, La., 7 South. Rep. 539.

32. CRIMINAL LAW — Burglary. — An indictment for burglary charging that defendant entered with intent to commit two separate offenses is not defective, since the intent does not constitute the offense, but is only a necessary ingredient.—*State v. Fox*, Iowa, 45 N. W. Rep. 874.

33. CRIMINAL LAW— False Pretenses. — In an indictment for falsely obtaining an option of purchase and power of attorney, the fact that the instrument which is copied in full, recites that "the said parties of the first part, own, in the right of the said Mrs. Eliza Spitlog, certain real estate and land situated," etc., does not supply the lack of a charge that defendant obtained the "property," as required by Rev. St. Mo. § 1561. Where the said instrument relates to lands situated in Kansas, and no showing is made to the contrary, the common law is presumed to prevail therein; and as by the common law a married woman's contract to convey could not be enforced, the option contract was neither "property" nor a "valuable thing." — *State v. Clay*, Mo., 13 S. W. Rep. 826.

34. CRIMINAL LAW— Instructions. — In the trial of an indictment for arson, the court instructing the jury, made use of the words "willfully" and "maliciously," without defining them: *Held*, not error where they were used in their ordinary sense, and the evidence was clear, as it will be presumed to have been where it does not all appear in the bill of exceptions.—*State v. Harkins*, Mo., 13 S. W. Rep. 830.

35. CRIMINAL LAW — Larceny. — A general verdict of "guilty" convicts a defendant of all that the indictment well alleges against him. Hence, where the charge is of larceny of several articles of values specified, such a verdict is a finding that the defendant stole every one of them, and that their several values were as averred. —*State v. Colwell*, Minn., 45 N. W. Rep. 847.

36. CRIMINAL LAW—Sentence.—One who has been tried and convicted on an informatian under How. St. Mich. § 9245, prescribing the penalty for aiding a prisoner to escape from jail, is not entitled to a release from imprisonment because the record of the sentence contains an averment that he was convicted of jail-breaking, which is described by How. St. Mich. § 9661, as the escape of a prisoner from any jail, workhouse, etc.—*In re Parks*, Mich., 45 N. W. Rep. 824.

37. CRIMINAL PRACTICE — Conviction of Accomplice.— One cannot be convicted as an accomplice where there is no evidence that the principal committed the crime charged.—*Armstrong v. State*, Tex., 13 S. W. Rep. 864.

38. CRIMINAL PRACTICE — Names. — Where an indictment for theft alleges to name the owner of the stolen property to be "Fraude," while the name as actually and properly spelled is "Freude," the question of variance should be submitted to the jury; and it is error to rule that the names are *idem sonans*. — *Weitzel v. State*, Tex., 13 S. W. Rep. 864.

39. DELIVERY BOND.— Code Ga. § 3326, which provides that an action may be maintained on a forthcoming bond given in a claim case for deterioration in the value of the property, does not authorize such action on a delivery bond for property taken under execution, where an affidavit of illegality has been filed. — *Walker v. Chambers*, Ga., 11 S. E. Rep. 582.

40. DESCENT AND DISTRIBUTION—Benefit Certificate.— Where a benefit certificate was payable to the "heirs," of deceased, who left a widow, but no children, the word "heirs" will be construed to mean those designated by the statute of distribution to take personal property, and, since the widow is thereunder entitled only after all the husband's kindred, she has no claim to the fund as against his brothers and sisters. — *Johnson v. Supreme Lodge*, Ark., 13 S. W. Rep. 794.

41. EMINENT DOMAIN.—A release in a grant of the coal under the surface of certain ground of the obligation of surface support is not binding on a corporation entering on the surface by right of eminent domain, but the grantees are entitled to be heard on the subject of compensation for coal required for support, and to injunction, unless the corporation gives security, or stipulates to be bound by the release.—*Penn. Gas Coal Co. v. Versailles Fuel Gas Co.*, Penn., 19 Atl. Rep. 933.

42. EQUITY — Joinder of Parties. — Several contract creditors of the same debtor, having no privity among themselves, may join in a bill brought under Code Ala. § 3544, to set aside and cancel for fraud a bill of sale, though there is no statute authorizing such joinder. — *Tower Manufg. Co. v. Thompson*, Ala., 7 South. Rep. 530.

43. ESTOPPEL—Usury.—In an action on a promissory note, in the absence of an allegation of fraud or mistake, defendant who signed the note for a loan negotiated in behalf of the payee by an agent, is estopped to deny that he did not know the payee in the transaction, and to claim that he intended to renew a former usurious loan, negotiated by the same agent for a different payee.—*Trimble v. Thorson*, Iowa, 45 N. W. Rep. 742.

44. ESTOPPEL IN PAIS.—Where a father in embarrased circumstances buys land, and takes a deed in the name of his son, with the understanding that the latter should hold the title for his benefit, and on the faith of such understanding builds on the land, plats it, and sells many of the lots, the widow and heirs of the son, after twenty-five years of non-claim, are estopped to assert title to the land as against the father's grantees, though they have made no improvements on the land, and though the deed to the son was duly recorded. — *Olden v. Hendrick*, Mo., 13 S. W. Rep. 821.

45. EVIDENCE—Life-tables.—While life-tables are admissible to assist the jury in estimating the expectation of life, they are not essential. The jury may make their estimate from the evidence as to the age and health of the person. — *Disen v, Chicago, etc. Ry. Co.*, Minn., 45 N. W. Rep. 864.

46. EVIDENCE — Surprise. — On September 12, 1888, plaintiff sold a horse to C for $100, and defendant, C's employer, agreed to pay for it out of C's wages. Ten days later the sale was rescinded, and a different horse sold for $110, defendant agreeing to pay for it as before. Before a justice, and also in the circuit court, plaintiff recovered for a balance due, under a bill of particulars for a horse sold September 12, 1888, for $110: *Held*, that it was error, on a new trial, to exclude evidence of the second sale on the ground of surprise, because the bill was for a sale made ten days earlier — *Tate v. Hamilton*, Mich., 45 N. W. Rep. 882.

47. EXECUTION — Exempt Property. — A constable's levy is not abandoned because he gives his execution to a sheriff, who makes a subsequent levy, subject to the constable's, on the same goods, and sells them. — *Miller v. Getz*, Penn., 19 Atl. Rep. 955.

48. EXECUTORS AND ADMINISTRATORS — Evidence. —A pass-book containing charges against a decedent, of various sums, in pencil, and mostly without date, cannot be used to show the state of accounts in a transaction between witness and deceased.—*Appeal of McNulty*, Penn., 19 Atl. Rep. 935.

49. FALSE IMPRISONMENT—Mistake. — Where plaintiff, in an action against a constable for false imprisonment, has waived all but compensatory damages, defendant cannot show that he acted in good faith, believing plaintiff to be the person for whom he had a warrant.— *Holmes v. Blyler*, Iowa, 45 N. W. Rep. 756.

50. FRAUDULENT CONCEALMENT. — To constitute a fraudulent concealment, incumbering or disposal of property by a debtor with intent to cheat and defraud his creditors, within the meaning of § 10, of the insolvent law of 1881, so as to entitle creditors to share in the assets without filing releases, the act must have been committed with an actual corrupt and dishonest intent to cheat and defraud creditors.—*Shotwell v. Nicollet Nat. Bank*, Minn., 45 N. W. Rep. 842.

51. GAMBLING—Public Houses. — A school-house is a "public house" within Pen. Code Tex. art. 356, prohibiting the playing of cards in public houses, and is none the less so on a day when there is no school, and the building is temporarily vacant, or being used for other purposes.—*Cole v. State*, Tex , 13 S. W. Rep. 859.

52. GARNISHMENT — Administratrix. — A judgment creditor of a woman garnished her, as the administratrix of her husband's estate, for a debt due from it to herself as an individual: *Held*, though under Code Iowa, § 2976, a garnishment will lie against an executor for a debt due from the decedent, yet in this case the proceeding would not lie, as its only effect would be to give plaintiff a second judgment against the garnishee, of no more force than the one he already has.—*Shepherd v. Bridenstine*, Iowa, 45 N. W. Rep. 746.

53. GARNISHMENT— Wages. — Plaintiff, a resident of Texas, was indebted to defendant also a resident of Texas, and was employed by a corporation doing business in Texas, and also in Missouri. Defendant, in order to secure payment of his claim, brought suit against plaintiff in Missouri, and garnished his wages in the hands of the corporation: *Held*, that injunction would lie to restrain defendant from prosecuting his claim in Missouri by a garnishment of wages exempt by the law of Texas.—*Moton v. Hull*, Tex., 13 S. W. Rep. 849.

54. HUSBAND AND WIFE—Separate Estate.—A husband

who has been a party to an authentic act by which it is declared that the wife purchases with her separate paraphernal funds, and for her separate benefit, is estopped from contradicting the verity of such recitals unless he first prove that such recitals were embodied in the act through fraud, error, or violence.—*Succession of Bellande*, La., 7 South. Rep. 535.

55. INJUNCTION. — The supreme court cannot enjoin the railway company's occupation of the right of way pending the amendment of the return to the writ of *certiorari*, as its jurisdiction in equity causes is exclusively appellate. — *Traverse City, etc. R. Co. v. Seymour*, Mich., 45 N. W. Rep. 826.

56. INSURANCE—Agents. — The agent of an insurance company, who is authorized to procure applications for insurance and to forward them to the company for acceptance, is the agent for the insurer, and not of the insured, in all that he does in preparing the applications, or as to any representations as to the character and effect of the statements so made.— *State Ins. Co. v. Jordan*, Neb., 45 N. W. Rep. 792.

57. INSURANCE — Conditions. — A requirement in a tornado insurance policy, that, in case of loss, the assured shall forwith give notice in writing to the secretary, is fully complied with by sending such notice direct to the company. — *Lewis v. Burlington Ins. Co.*, Iowa, 45 N. W. Rep. 749.

58. INSURANCE—Policy.—A stipulation in an insurance policy issued in Dakota territory, upon property therein, which limits the time within which an action may be brought upon the policy to the period of six months from the date of loss, is void. Such stipulation would be upheld at common law, but is void under the statute. — *Johnson v. Dakota, etc. Ins. Co.*, N. Dak., 45 N. W. Rep. 799.

59. INTOXICATING LIQUORS. — Where plaintiff voluntarily pays a liquor license tax, as required by law, before engaging in the business of selling liquors, and afterwards abandons the business because she is unwilling or unable to furnish the bond required, she cannot recover the amount of the tax so paid. — *Curry v. Township*, Mich., 45 N. W. Rep. 831.

60. JUDGMENT— Costs. — In an action for assault and battery, where defendant serves on plaintiff an offer in writing to allow judgment to be taken against him for $25, "to be a final settlement of the cause," and plaintiff refuses to accept the offer, and after trial has verdict for only $19, judgment should be against him for all costs accruing after the offer, as provided by Code Iowa, § 2900.—*De Long v. Wilson*, Iowa, 45 N. W. Rep. 764.

61. JUDGMENT BY CONFESSION. — Where a judgment is confessed by defendant, who was served with process, and answered, and upon confession was granted a stay of execution, the judgment will not be set aside on the ground that no affidavit of the justness of the debt was filed, as required by Rev. St. Tex. art. 1347, providing that where judgment is rendered by confession the justness of the debt must be sworn to by the person in whose favor the judgment is confessed. — *Chestnutt v. Pollard*, Tex., 13 S. W. Rep. 852.

62. JUSTICES OF THE PEACE—Jurisdiction.—The holder of two bills of exchange accepted at different times, maturing at different times, and each within the jurisdictional amount of a justice of the peace, may maintain separate actions on each in justice's court, though together they exceed the justice's jurisdiction, and though, at his election, he might have sued on both in one action in the circuit court. — *Drysdale v. Biloxi Canning Factory*, Miss., 7 South. Rep. 541.

63. JUSTICE OF THE PEACE — Jurisdiction. — A recess taken by a justice's court at 2 o'clock P. M. until 10 o'clock A. M. of the following day, on account of the illness of the justice, is not an "adjournment," within the meaning of Rev. St. Wis. § 3574, subd. 5, which requires the justice to enter in his docket "every adjournment, stating at whose request, and to what time and place;" and hence the justice does not lose jurisdiction by his failure to enter in his docket the place to which the recess was taken.— *French v. Higgins*, Wis., 45 N. W. Rep. 817.

64. LEASED CONVICTS — Escape. — Act Ga. 1876, p. 40, upon leasing penitentiary convicts, declares that the lessee shall immediately after any escape report in writing to the principal keeper, who shall lay the same before the governor, all the circumstances attending such escape; and, if the governor shall find that such escape was caused by negligence, it shall be his duty to institute suit for the damages provided for: *Held*, that it was necessary to allege and prove the making of the governor's order to the attorney-general, directing the suit to be brought, and reciting his decision that the excuses made for the escape in question were unsatisfactory.—*Georgia Penitentiary Co. v. Gordon*, Ga., 11 S. E. Rep. 584.

65. LIMITATION OF ACTIONS— Acknowledgment. — The petition in an action on two notes, apparently barred by the statute of limitations, alleged that they constituted a part of the indebtedness of $9,000, concerning which defendant had within the period of limitations written plaintiff a letter stating that he had paid to plaintiff's agent the interest due and to become due on that sum: *Held*, under Code Iowa, § 2539, this letter was an admission of indebtedness, and plaintiff could show that the notes sued on constituted a part thereof. — *Mille v. Beardsley*, Iowa, 45 N. W. Rep. 756.

66. MARRIAGE—Minors.— The marriage of a boy in his sixteenth year, although declared by the Code to be void in the sense of being absolutely void, may nevertheless be ratified and confirmed by continuing, after arriving at the age of 17 years, to cohabit with his wife as such. The Code of 1863 required a license, or the publication of banns, as a condition to the validity of any marriage; but this provision of the Code was repealed by the act of December, 1863, by which repeal the common law as to informal marriages was restored. The power to make marriage by consent and cohabitation being thus reinstated, the power to complete and confirm by like means an inchoate and imperfect marriage was also revived.—*Smith v. Smith*, Ga., 11 S. E. Rep. 496.

67. MALICIOUS PROSECUTION.—An action for malicious prosecution will not lie for preferring an accusation before a magistrate charging plaintiff with a criminal offense, if he was not apprehended, and no process was issued for his arrest. — *Cooper v. Armour*, U. S. C. C. (N. Y.), 42 Fed. Rep. 215.

68. MALICIOUS PROSECUTION— Attorney.—An attorney is liable to third persons for damages for causing process to be issued at the instance of his client, only when he acts dishonestly, with some sinister view or improper purpose of his own which in law amounts to malice. — *Farmer v. Crosby*, Minn., 45 N. W. Rep. 866.

69. MALICIOUS PROSECUTION—Evidence.—In an action for malicious prosecution, the warrant on which plaintiff was arrested, and the recorder's docket, should not be rejected when offered in evidence, because the recorder, having been advised of the facts, drew the complaint and warrant, and it was by his negligence that they were not in proper form, as plaintiff's action is based on such complaint and warrant. — *Cooney v. Chase*, Mich., 45 N. W. Rep. 833.

70. MANDAMUS — Petition. — A petition for a writ of *mandamus* to compel a school board to remove a privy situated across the street from petitioner's house, which is an injury to him, is demurrable, where it does not state the cause of injury to petitioner, but only alleges that such privy has been declared by the board of health a nuisance, and dangerous to the public health. —*Kallsen v. Wilson*, Iowa, 45 N. W. Rep. 765.

71. MARINE INSURANCE—Jurisdiction. — A stipulation, in a marine insurance policy issued in a foreign country, providing that suit on the policy shall only be prosecuted in a specified foreign court, is invalid. — *Slocum v. Western Assur. Co.*, U. S. D. C. (N. Y.), 42 Fed. Rep. 235.

72. MECHANICS' LIENS—Description.— The description

in an affidavit for a mechanic's lien is sufficient if it so points out the building, and the land on which it is situated, that they can be identified with reasonable certainty by applying the description to the land. It is not necessary to give the common name of the building. The essential thing is to describe it so that it can be identified, and if this be done it is a substantial compliance with the requirements of the statute.— *Northwestern Cement Co. v. Norwegian Danish Seminary*, Minn., 45 N. W. Rep. 868.

73. MORTGAGE—Taxes.— Where the mortgagee of real estate pays the taxes on the mortgaged premises to enable him to negotiate the mortgage, and subsequently he sells the mortgage to the mortgagors, and executes and delivers an unconditional release of the mortgage and the debt secured thereby: *Held*, that the mortgagee could not afterwards maintain an action against the mortgagors for the amount of the taxes so paid.—*Kersenbrock v. Muff*, Neb., 45 N. W. Rep. 778.

74. MORTGAGE — Notice. — Where the attorney of a purchaser at execution sale had notice that the debtor had given a mortgage, and although in the record thereof other lands were described, the mortgagor had no interest therein, and that the only lands he owned were the lands purchased, the purchaser had sufficient notice to put him upon inquiry whereby to discover the mistake in the record, and he took subject to the mortgage.—*Shoemaker v. Smith*, Iowa, 45 N. W. Rep. 744.

75. MORTGAGE FORECLOSURE.—A mortgagor was out of the State when suit to foreclose was brought, and was not served with notice, but he had actual notice of the decree eight months before the expiration of the period allowed for redemption, and knew that his family had given possession to the mortagee, who bought in the property. He made propositions to redeem, and furnished money to another to purchase a junior mortgage, and caused an action to be instituted to enforce the right of redemption under it. He knew, after the expiration of the period for redemption, that defendant sold part of the lands, and that valuable improvements were being made thereon from time to time, but did not assert any right or interest in the property. *Held*, that he was estopped from seeking to enforce the right to redeem.—*Schlawig v. Fleckenstein*, Iowa, 45 N. W. Rep. 770.

76. MUNICIPAL CORPORATIONS.—City Officers. —Under Mansf. Dig. Ark. § 926, which provides that a city council shall not increase the salary of a city officer during his term in office, when the council of a city of the second class has fixed the salary of the city attorney, it cannot, after becoming a city of the first class, increase his salery during his term in office.—*Barnes v. Williams*, Ark., 13 S. W. Rep. 845.

77. MUNICIPAL CORPORATIONS.—Lease of Wharves. —The city of St. Louis leased to defendant, an elevator company, a portion of its unpaved wharf, for the purpose of erecting thereon "a shed or warehouse for storage and handling of grain or other merchandise in connection with the elevator," reserving the right to control the use of such buildings and grounds, and to terminate the lease on six months' notice, if it were desired to pave and extend the wharf: *Held*, that the lease is valid under the general power to erect, repair, and regulate wharves, and collect wharfage.—*Belcher's Refinery Co. v. St. Louis Grain Elevator Co.*, Mo., 13 S. W. Rep. 822.

78. NEGLIGENCE.—Where the entrance to a public hall was by a lighted hall and stairway known to plaintiff, he is guilty of contributory negligence in leaving this way, and stepping outside the building, in the dark, upon a platform from which he fell; it having no railing.—*Johnson v. Wilcox*, Pa., 19 Atl. Rep. 939.

79. NEGLIGENCE—Fellow-servant.—In a suit against a water company, it appeared that defendant's foreman, who was personally engaged in calking certain iron pipes raised upon blocks for that purpose, called plaintiff to help him raise the end of one of them, and while doing so it rolled from the blocks, and broke plaintiff's leg: *Held*, the failure of the foreman to properly wedge the pipe in its place was the negligence of a fellow-servant.—*Johnson v. Ashland Water Co.*, Wis., 45 N. W. Rep. 807.

80. NEGLIGENCE—Fire—By Code Iowa, § 3890, one who starts a prairie fire is liable for all damage caused thereby, irrespective of the degree of diligence used to keep it under control; and one who claims exemption from this general rule on the ground that it was necessary to start a back fire in order to preserve his property from another fire, which was approaching it, must specially plead such defense. It cannot be proved under the general issue.—*Thabwin v. Campbell*, Iowa, 45 N. W. Rep. 769.

81. NEGOTIABLE INSTRUMENT—Discharge.— In an action on a promissory note, it appeared that defendant was joint maker of the note, and had after its maturity paid one-half of it to plaintiff's son, who erased defendant's name at his request: *Held*, that such part payment was not a discharge of the note, whether plaintiff's son had authority to make the erasure or not, and that defendant was still liable.—*Eldred v. Peterson*, Iowa, 45 N. W. Rep. 755.

82. NEGOTIABLE INSTRUMENT.—Failure of Consideration—In an action on a promissory note by the payee, an answer which alleges a failure of consideration is not demurrable because it fails to allege that the note was procured by deception and fraud, as failure of consideration may be consistent with an honest intent. *Aultman-Taylor Co. v. Trainer*, Iowa, 45 N. W. Rep. 757.

83. NEGOTIABLE INSTRUMENTS—Interest.—A note not made payable at any particular place is governed as to interest by the law of the State where it was made and delivered.—*Clark v. Searight*, Penn., 19 Atl. Rep. 941.

84. NEGOTIABLE INSTRUMENT—Pleading.—An allegation in a petition that "the defendant, by his promissory note filed herewith, agreed and promised to pay," etc., is sufficient averment of the execution and delivery of the note.—*Bell v. Mansfield's*, Ky., 13 S. W. Rep. 838.

85. PARTNERSHIP—Insolvency.—The members of a copartnership having made a general assignment of both individual and partnership property for the benefit of creditors, a debt of the insolvents is provable as a claim in the insolvency proceedings whether the debt be of an individual or partnership character. —*Lindeke v. Clark*, Minn., 45 N. W. Rep. 863.

86. PRACTICE—Deposition.—Under Code Iowa, § 3571, as amended by Acts 17th Gen. Assem. ch. 26, which provides that, where a deposition has been filed three days before the beginning of the term, no exception thereto other than for incompetency and irrelevancy shall be regarded, unless made by motion filed by the morning of the second day of the term, a motion to suppress a deposition because not properly certified comes too late when made on the eighteenth day of the term; the deposition having been filed more than two weeks before its commencement.— *Turner v. Hardin* Iowa, 45 N. W. Rep. 758.

87. PRACTICE—Summons.—Rev. Code Miss., 1880, § 1857, does not authorize a personal judgment against a non-resident so served; section 2467 providing that, on judgment by default against a non resident who has been served as provided in section 1857, no execution shall issue except against the property attached in the suit.— *Cudabac v. Strong*, Miss., 7 S. W. Rep. 543.

88. RAILROAD COMPANIES—Accidents at Crossings. —In an action against a railroad company for injuries to plaintiff's team at a crossing, where witnesses for defendant testify that the bell was rung and the whistle blown before the train reached the crossing, and a witness for plaintiff testifies that he was observing the train, and did not hear either, though he was in a situation to do so, the evidence is sufficient to take the case to the jury.—*Lee v. Chicago, R. I. & P. Ry. Co.*, Iowa, 45 N. W. Rep. 739.

89. RAILROAD COMPANIES.—Where the amount expended by plaintiff for medical services is shown, and it further appears that he was in bed five months, during which time he was nursed by ladies about the

house, a verdict which does not appear to be excessive will not be set aside on account of an instruction that plaintiff is entitled to recover for medical services and nursing, though there is no evidence as to the value of the nursing.—*Murray v. Missouri Pac. Ry. Co.*, Mo., 13 S. W. Rep. 817.

90. RAILROAD COMPANIES—Municipal Aid.—In Wisconsin, a donation of land by a county to a railroad company in aid of the construction of its road is absolutely void, though authorized by the legislature.—*Ellis v. Northern Pac. R. Co.*, Wis. 45 N. W. Rep. 811.

91. RAILROAD COMPANIES—Negligence.—Error in admitting in evidence a void city ordinance regulating the blowing of locomotive whistles was fully corrected by the court's subsequently instructing the jury that it was void, and that they should not consider it, but treat the case as if no ordinance had been passed, and then instructing them correctly as to the rules of law applicable to the case.—*Dugan v. St. Paul & D. R. Co.*, Minn., 45 N. W. Rep. 851.

92. RAILROAD COMPANIES—Station Accommodations.—Under the provisions of the "act to regulate railroads," etc., which took effect July 1, 1887, the board of transportation of the State may institute an action, in a proper case, to require a railroad company to furnish like facilities to erect an elevator at one of its stations to any person engaged, or who desires in good faith to engage, in the business of receiving, handling and shipping grain over the railway.—*State v. Mo. Pac. Ry. Co.*, Neb., 45 N. W. Rep. 784.

93. REPLEVIN — Payment. — Monthly payments by a debtor, in excess of the interest payable on the debt, will be applied to the principal of the debt, and will not be treated as compensation for extensions of time, though they were so denominated by the parties when made.—*Bateman v. Blake*, Mich., 45 N. W. Rep. 831.

94. SALE—Lien for Price.— Where, in an action for possession of personal property, the defense is that defendant sold the property to the person from whom plaintiff purchased through such person's agent, on condition that defendant should retain possession and have a lien on the property until paid for, it is competent for plaintiff's vendor to testify as to the terms of the sale to plaintiff.—*Dutton v. Kneebs*, Iowa, 45 N. W. Rep. 875.

95. SALE—Rescission.—Where defendants, in an action for the price of goods sold, retained the goods for three months, selling some of them, and, when pressed for payment, claimed to rescind the contract because the goods were defective, a charge that if the contract was not rescinded in time, and if the goods were not such as represented, plaintiffs would be entitled to recover what the goods were reasonably worth, is proper. —*Wolverton v. McCabe*, Mich., 45 N. W. Rep. 830.

96. SALE OF LANDS— Memorandum. — An oral agreement was made for the sale of lands, with the understanding that the vendee's wife was to meet the vendor at an attorney's office, at an appointed time, to complete the transaction. The title being then objected to, a deed was executed and left with the attorney, the vendee's wife agreeing to accept it and pay the purchase money when an abstract of title was furnished and a certain tax-title conveyed. She was not authorized in writing by her husband: *Held*, the execution of the deed was not a signing of a memorandum of the contract of sale by the vendor, as required by How. St. Mich. § 6181, and, the conveyances being refused, a suit for the price could not be maintained.—*Ducet v. Wolf*, Mich., 45 N. W. Rep. 829.

97. SCHOOL-BOARDS.—Where the acts and proceedings of a school board are within the scope of its authority, and it has examined the statements and vouchers of its treasurer, and approved the same, and granted a discharge, they are conclusive, unless said approval and discharge were obtained on false statements and fraudulent vouchers.—*Parish School-board v. Packwood*, La., 7 South. Rep. 537.

98. TAXATION—Injunction.—An injunction restraining the collection of taxes will be granted, in Pennsylvania, where the assessors of a city of the third class have made an assessment for city purposes greatly in excess of the triennial assessment for State and county purposes made the previous year.—*Appeal of Kemble*, Penn., 19 Atl. Rep. 946.

99. TAX-DEED—Limitations.—In an action involving title to real estate, plaintiff claimed under a tax-deed, while defendant held the patent title. The action was brought more than five years after the issuance of the tax-deed, but within five years of its recordation. The land was unoccupied until after the recording of the deed: *Held*, that plaintiff's neglect to file his deed did bar the action, under Code Iowa, § 902, requiring actions for the recovery of real property sold for taxes to be brought within five years after the treasurer's deed is executed and recorded.—*Strabala v. Lewis*, Iowa, 45 N. W. Rep. 871.

100. TAX-SALE.—Under Code Iowa, § 894, it is sufficient if such affidavit refers to the annexed affidavit of the publisher that the printed notice pasted upon the latter was published as required by law.—*Smith v. Heath*, Iowa, 45 N. W. Rep. 768.

101. TRANSACTIONS WITH DECEDENTS.—The maker of a note is an incompetent witness to prove its payment in an action between himself and the administrator of the payee.—*Mell v. Barner*, Penn., 19 Atl. Rep. 940.

102. TROVERS AND CONVERSION. — Where, after the withdrawal of plaintiffs as members of a corporation, all matters of difference between them and the corporation have been fully settled, and it has agreed to deliver up to plaintiffs, certain patterns on demand, plaintiffs, on making demand, are entitled to the patterns without storage charges up to the time of the settlement, and for a reasonable time thereafter. —*Galvin v. Galvin Brass & Iron Works*, Mich., 45 N. W. Rep. 654.

103. VENDOR AND VENDEE.—In an action on notes given for the price of land sold by plaintiff to defendant, where failure of consideration is pleaded, in that plaintiff did not own the land in question, but that it had been purchased by defendant from one L, of which fact defendant was ignorant when he gave the notes, evidence of a sale of land—in a certain lot in a certain ward in the city of A, where the land in question was located, without further description as to its boundaries — under a tax execution against one B, and its purchase by L, pursuant to an agreement between L, and B, is irrelevant.—*Phillips v, O'Neal*, Ga., 11 S. E. Rep. 581.

104. WARRANTY.— The doctrine of rebutter by collateral warranty is not a part of the common law of this State.—*Goodwin v. Kumm*, Minn., 45 N. W. Rep. 853.

105. WILLS—Construction.— Where a testator devises all his personal and real property to his wife, except as thereafter provided in his will, and in a subsequent clause states that it is his "desire" that what remains at her decease shall be divided between named persons, the wife takes a fee-simple in the realty, and the absolute property in the personalty, the later clause being merely precatory.—*Bills v. Bills*, Iowa, 45 N. W. Rep. 748.

106. WILLS — Executory Limitations. — An absolute devise, followed by a proviso that, if the devisee "die without children, grandchildren, or wife living," the estate shall go over, carries the fee to the devisee, if he survive the testator; for the limiting words will be taken to refer to the devisee's death in the life-time of the testator, unless a contrary intention appears. —*King v. Trick*, Pa., 19 Atl. Rep. 651.

107. WITNESS—Impeachment.— Rev. St. Ind. § 507, permits a party to impeach or contradict his own witness only when the testimony is a surprise, and is prejudicial; and, where, in a suit for charging plaintiff with unchaste conduct, a witness produced by the defense was asked by defendant's attorney if he ever had sexual intercourse with plaintiff, and answered that he had not, it was proper to exclude evidence of his declarations to the contrary.— *Miller v. Cook*, Ind., 24 N. E. Rep. 577.